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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1994

THE OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND, et al.,

Petitioners,

v.

EDMUND M. MAHERN, TRUSTEE FOR MERCHANTS GRAIN, INCORPORATED,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT SHOULD GRANT CERTIORARI IN THIS CASE IN LIGHT OF ITS ANTICIPATED RULING IN *SEMINOLE TRIBE OF FLORIDA v. STATE OF FLORIDA, et al.*, No. 94-12.

II. WHETHER CONGRESS HAS THE AUTHORITY, PURSUANT TO ARTICLE I, §8, cl. 4, OF THE UNITED STATES CONSTITUTION, TO ABROGATE OHIO'S ELEVENTH AMENDMENT IMMUNITY TO SUIT IN FEDERAL COURT, SUCH THAT OHIO MAY BE MADE AN INVOLUNTARY PARTY IN A BANKRUPTCY PROCEEDING.

III. WHETHER THE COURT SHOULD OVERRULE ITS DIVIDED DECISION IN *PENNSYLVANIA v. UNION GAS CO.*, 491 U.S. 1 (1989).

PARTIES

The parties in this case are The Ohio Agricultural Commodity Depositors Fund and the Ohio Commodity Advisory Commission as petitioners, and Edmund M. Mahern, Trustee for Merchants Grain, Incorporated, as respondent.

Pursuant to Rule 29.4(b), Rules of this Court, 28 U.S.C. §2403(a), may be applicable, in that the constitutionality of 11 U.S.C. §106(a) is drawn into question. Pursuant to Rule, service is being made on the Solicitor General.

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The Opinion of the United States Court of Appeals for the Seventh Circuit, filed June 30, 1995, in Case No. 94-1721, is reported as *In The Matter of: Merchants Grain, Incorporated*, 59 F.3d 630 (7th Cir. 1995), and is reproduced at A-1.

The Order of the United States District Court, Southern District of Indiana, filed March 7, 1994 is unreported and is reproduced at A-16.

The Order of the United States Bankruptcy Court, Southern District of Indiana, filed February 4, 1993 is unreported and is reproduced at A-23.

JURISDICTIONAL STATEMENT

The Opinion of the United States Court of Appeals for the Seventh Circuit was entered on June 30, 1995. (A-1). Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Article I, §8, cl. 4, United States Constitution. To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

Eleventh Amendment, United States Constitution. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

11 U.S.C. §106(a)

Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title [11USCS §§ 101 et seq.] or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title [11 USCS §§ 101 et seq.], the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(As amended Oct. 22, 1994, P.L. 103-394, Title I, § 113, 108 Stat. 4117.)

Page's Ohio Revised Code § 926.18.

Claims of depositors for indemnification; procedures; liability limits; attorney's fees

(A) When a depositor has made a demand for settlement of an obligation concerning an agricultural commodity on which a fee was required to be remitted under section 926.16 of the Revised Code and the licensed handler has failed to honor the demand, the depositor, after providing the director of agriculture or his authorized representative with evidence of his demand and the dishonoring of his demand, may file a claim with the director for indemnification of his damages, from the agricultural commodity depositors fund, to be measured as follows:

(1) The commodity advisory commission created in section 926.32 of the Revised Code shall establish the dollar value of the loss incurred by a depositor holding a receipt or a ticket for agricultural commodities on which a fee was required and that he delivered to the handler under a delayed price

agreement or under a bailment agreement. The value shall be based on the fair market price being paid to producers by handlers for the commodities on the date on which the director received notice that the receipt or ticket was dishonored by the handler. All depositors filing claims under this division shall be bound by the value determined by the commission.

(2) The dollar value of the loss incurred by a depositor who has sold or delivered for sale, exchange, or solicitation or negotiation for sale agricultural commodities on which a fee was required and who is a creditor of the handler for all or a part of the value of the commodities shall be based on the amount stated on the obligation on the date of the sale.

(B) The agricultural commodity depositors fund shall be liable to a depositor for any moneys that are not recovered through other legal and equitable remedies as follows:

(1) For commodities stored with a licensed handler under a bailment agreement for one hundred per cent of his loss as determined under division (A)(1) of this section;

(2) For commodities stored with a licensed handler under an agreement other than a bailment agreement for one hundred per cent of the first ten thousand dollars of his loss and eighty per cent of the remaining

dollar value of his loss as determined under divisions (A)(1) and (2) of this section. The aggregate amount recovered by a depositor under all remedies shall not exceed one hundred per cent of the value of his loss. If the moneys recovered by a depositor under all remedies exceed one hundred per cent of the value of his loss, the depositor shall reimburse the fund in the amount that exceeds the value of his loss.

(C) The director, with the approval of the commodity advisory commission, shall determine the validity of all claims presented against the fund. A claim filed under this section for losses on agricultural commodities other than commodities stored under a bailment agreement shall not be valid unless the depositor has made a demand for settlement of the obligation within twelve months after the commodities are priced or delivered for sale, whichever occurs later. Any depositor whose claim has been refused by the director and the commission may appeal the refusal to either the court of common pleas of Franklin county or the court of common pleas of the county in which the depositor resides.

The director shall provide for payment from the fund to any depositor whose claim has been found to be valid.

(D) If at any time the fund does not contain sufficient assets to pay valid claims, the director shall hold those claims for

payment until the fund again contains sufficient assets. Claims against the fund shall be paid in the order in which they are presented and found to be valid.

(E) If a depositor files an action for legal or equitable remedies in a state or federal court having jurisdiction in those matters that includes a claim against agricultural commodities upon which the depositor may file a claim against the fund at a later date, he shall also file a with the director a copy of the action filed with the court.

In the event of payment of a loss under this section, the director shall be subrogated to the extent of the amount of any payments to all rights, powers, privileges, and remedies of the depositor against any person regarding the loss.

The depositor shall render all necessary assistance to aid the director in securing the rights granted in this section. No action or claim initiated by the depositor and pending at the time of payment form the fund may be compromised or settled without the consent of the director.

(F) If, prior to the effective date of this amendment, a lawsuit, adversary proceeding, or other legal proceeding is brought against a depositor to recover money or payments from funds to which a depositor has a right of indemnification under this

section, and the depositor retains legal counsel resulting in a cost or expense to the depositor, upon the rendering of a judgment or other resolution of the lawsuit, adversary proceeding, or other legal proceeding, the director, in his discretion and with the approval of the commodity advisory commission, may authorize indemnification from the fund for attorney's fees paid by the depositor. Any claim made by a depositor for the payment of attorney's fees under this division shall be made in the same manner as a claim under division (A) of this section.

Attorney's fees payable under this division shall be limited to the actual hourly fee charged or one hundred dollars per hour, whichever is less, and to a total maximum amount of three hundred dollars.

STATEMENT OF THE CASE

The issue in this case is whether the Eleventh Amendment, United States Constitution, bars a suit against agencies of the State of Ohio by a trustee in bankruptcy to recover alleged preferential payments, where the agencies of the State are involuntary parties to the bankruptcy action. The court below held that no Eleventh Amendment immunity exists in this instance because it had been abrogated by Congress.

The State agencies involved are the Ohio Agricultural Commodity Depositors Fund and the Ohio Commodity Advisory Commission. The Fund was created by the Ohio legislature (R.C. §926.16, Page's Ohio Revised Code) to indemnify grain depositors who lose money due to the insolvency of commodity handlers licensed by the State. R.C. §926.18, Page's Ohio Revised Code. The money in the Fund comes from a per-bushel fee paid by grain depositors to the licensed commodity handlers who in turn remit the money to the Fund. The Ohio Commodity Advisory Commission (R.C. 926.32, Page's Ohio Revised Code) helps administer the Fund. The Director of the Department of Agriculture, with approval of the Commission, allows claims against the Fund by eligible depositors. R.C. §926.18(c), Page's Ohio Revised Code. The bankruptcy court, the district court and the court below all agreed that the Fund and the Commission are agencies of the State for purposes of this case:

> Given the plain language of the Ohio statutes, any judgment rendered against the Fund or the Commission would effectively be a judgment against the State of Ohio.

Matter of Merchants Grain, Inc., 59 F.3d at 633. (A-7).

During 1990, Merchants Grain, Inc. ("MGI") operated grain elevators and held commodity handlers licenses in Ohio and several other states. In the fall of 1990, MGI purchased large quantities of grain and other commodities pursuant to deferred pricing contracts, under which MGI took title to the grain without paying for it or immediately setting a price. In November 1990, when MGI failed to meet certain requirements established by the Ohio Department of Agriculture, the Department conditionally suspended MGI's license. When MGI failed to then meet the Department's conditions, the Department fully suspended MGI's license. Under the terms of a settlement reached between the Department and MGI, MGI agreed to liquidate all grain stored in its Columbus, Ohio elevator to cover its obligations to Ohio depositors under the deferred payment contracts. As a result of the Department's actions, Ohio farmers were paid over 3 million dollars.

MGI filed a Chapter 11 bankruptcy on May 9, 1991 and Mr. Mahern, respondent herein, was named as Trustee. On March 12, 1992, Mr. Mahern initiated an adversary proceeding to recover from the Fund and Commission alleged preferential transfers, including the payments made by MGI to Ohio farmers during the 90 days prior to the Chapter 11 Bankruptcy filing. Mr. Mahern alleged that the Fund and Commission were liable because the Fund had avoided its indemnification obligation to the farmers through the preferential payments.

The Fund and the Commission filed a motion to dismiss contending that they were immune from suit for monetary damages under the Eleventh Amendment. Relying on this Court's decisions in *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) and *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989), the bankruptcy

court agreed and granted the agencies' motion. (A-16). The district court affirmed. (A-23).

After the district court's decision, Congress amended 11 U.S.C. §106(a) to waive the sovereign immunity of the states in bankruptcy matters and in the process to repeal legislatively the Court's decisions in *Nordic Village* and *Hoffman*. In light of this amendment, the Seventh Circuit rejected the agencies' immunity defense. *Matter of Merchants Grain*, 59 F.2d at 637 (A-12). This petition is filed to challenge that holding and specifically to challenge Congress' authority to abrogate Ohio's Eleventh Amendment immunity.[1]

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[1] Respondent Trustee also brought an independent action against the depositors seeking return of the alleged preferential payments. The bankruptcy court and district court both rejected this claim, concluding that the payments were not "preferential". *Merchants Grain, Inc. v. Adkins, et al.*, 184 Bank. 52, 1995 U.S. Dist. LEXIS 11911 (S.D. Indiana 1995). That decision is on appeal to the Seventh Circuit, and thus is not final.

REASONS FOR GRANTING THE WRIT

A. Certiorari Should Be Granted In Light of The Court's Anticipated Decision In *Seminole Tribe of Florida v. State of Florida, et al.*, No. 94-12, Since That Decision May Change The Precedential Landscape Upon Which The Opinion of The Court Below Was Based.

In *Chavez v. Arte Publico Press*, 59 F.3d 539, 541 (5th Cir. 1995), the Court stated:

> A State's immunity from suit in federal court has a turbulent past, an enigmatic present, and an uncertain future.

This case aptly demonstrates that statement.

At the time this case was filed, it appeared clear that a state was not subject to being an involuntary party in a bankruptcy proceeding. Relying on *Hoffman*, *supra*, and *Nordic Village, supra*, the bankruptcy court and the district court held that a state could not be such an involuntary defendant. (A-16, 23). The sole issue before those courts was simply whether the petitioners here should be considered to be agencies of Ohio to which the Eleventh Amendment immunity of the State flowed. Since both courts found petitioners to be agencies of Ohio, the trustee's complaint was dismissed. (A-21, 31).

Following oral argument in the court below, however, Congress unequivocally waived any such immunity of the

states by amending 11 U.S.C. §106(a). The court below therefore returned to its pre-*Hoffman* and pre-*Nordic Village* holdings that Congress may abrogate a state's Eleventh Amendment immunity defense in bankruptcy proceedings. *In re McVey Trucking*, 812 F.2d 311 (7th Cir.), *cert. denied*, 484 U.S. 895 (1987).

The case of *Seminole Tribe of Florida v. State of Florida, et al.*, No. 94-12 is now pending before the Court. The Court should grant certiorari in this case in light of its anticipated ruling in *Seminole Tribe*, since that case challenges several of the premises upon which the decision of the court below is based.

The court below rested its ruling on three bases. First, the court below concluded, "there was no constitutional basis for distinguishing between the plenary powers accorded Congress under the Fourteenth Amendment and those accorded under Article I." *Matter of Merchants Grain, Inc.*, 59 F.3d at 634 (citing *McVey Trucking*, 812 F.2d at 316-323). (A-10).

Second, the court below held that no distinctions exist among the various Article I powers granted to Congress. Accordingly, it recognized no distinction with respect to Congress' power to abrogate state immunity under Article I:

> It should thus come as no surprise that virtually every Court of Appeals to have reached the issue since *Union Gas* has concluded that Congress has the authority to abrogate the State's immunity from suit when legislating pursuant to the plenary powers granted it under Article I of the Constitution.

59 F.3d at 636 (A-12).

Finally, the court below held that a contrary decision was foreclosed by *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989):

> Justice White cast the fifth and decisive vote, concluding that Congress did indeed have the authority under Article I to abrogate the State's Eleventh Amendment immunity.

59 F.3d at 635 (citing *Union Gas*, 491 U.S. at 57, (White, J. concurring)). (A-11).

In *Seminole Tribe of Florida v. State of Florida, et al.*, No. 94-12, all three of the conclusions asserted above are at issue. In *Seminole Tribe*, the lower court found that congressional abrogation of a state's immunity was unique under the Fourteenth Amendment:

> The Court has not yet found that Congress possesses the power to abrogate the states' sovereign immunity when legislating under any other provisions of the Constitution.

Seminole Tribe of Florida v. State of Florida, et al., 11 F.3d 1016, 1023 (11th Cir., 1994).

Similarly, the lower court in *Seminole Tribe* found that abrogation principles may vary depending on which Article I clause may be involved: "Although the Interstate and Indian Commerce Clauses are contained in the same textual provision, the purposes that prompted their inclusion in the Constitution as well as their subsequent legal interpretations are distinct." 11 F.3d at 1025 n.9 (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

Finally, the *Seminole* court questioned the precedential value, as well as the continued validity of *Pennsylvania Gas*, because the plurality opinion relied on Justice White's fifth vote and separate concurrence, which did not "agree with much of [Justice Brennan's] reasoning." 11 F.3d at 1026 (*citing Pennsylvania Gas*, 491 U.S. at 57 (White J. Concurring)).[2]

It thus is possible that *Seminole Tribe* may have a significant impact on the decision of the court below. The Court may overrule or distinguish *Union Gas*, either of which would require remand in this case. Similarly, the Court may find that even if Congress may abrogate the States' Eleventh Amendment Immunity under the Commerce Clause, it does not follow that such authority exists under other Article I clauses. Such a holding, too, would require the court below to reexamine whether abrogation is required under Article I, §8, cl. 4 for bankruptcy proceedings. At a minimum, then, the Court should hold this case for decision pending the result of the *Seminole Tribe* case, and grant certiorari, vacate the decision below, and remand the case in light of the Court's decision.

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[2] *See also Chavez*, 59 F.2d at 545 (interpreting Justice White's concurrence as finding waiver in the particular circumstances of the case, but not establishing a congressional right to abrogate state sovereign immunity).

B. Certiorari Should Be Granted To Establish That Congress Does Not Have Authority To Abrogate A State's Eleventh Immunity From Suit Under Article I, §8, cl. 4, of the United States Constitution.

Indeed, even though *Pennsylvania v. Union Gas, supra* involved Congress's authority under the Commerce Clause, a number of circuit courts have improperly held that Congress also has authority to abrogate a state's immunity from suit under other provisions of Article I, United States Constitution. Thus, for example, in *Chavez*, the Fifth Circuit held that Congress had authority to abrogate a state's sovereign immunity under the Copyright Clause, *see* Article I, § 8, cl. 8, because "there is no principled reason to distinguish between this and other Article I, Section 8 powers entrusted to Congress." 59 F.3d at 546. But even granting the continued validity of *Pennsylvania Gas*, the view that all Article I authority suffices to waive state sovereign immunity has never commanded a majority of the Court.

Hoffman is illustrative. Justice Marshall was unable to persuade a majority of the Court to accept the following view: "I see no reason to treat Congress' power under the Bankruptcy clause any differently, for both constitutional provisions give Congress plenary power over national economic activity." 492 U.S. at 11 (Marshall J. joined by Brennan, Blackmun, and Stevens, J.J., dissenting). Justice Scalia, concurring, held that since "there is no basis for treating [Congress'] powers under the Bankruptcy Clause any differently," he would affirm without "considering whether Congress intended to exercise a power it did not possess". 492 U.S. at 105 (Scalia J. concurring).

The Court should not assume that distinctions with respect to Congress' power to abrogate cannot be drawn among Article I powers. Followed to a logical extreme, a contrary view would mean Congress would have unbridled authority under the "Necessary and Proper Clause" to abrogate, since that is an Article I, § 8 power as well.[3] Given historical concerns for a proper balance between the states and the federal government, it is difficult to reconcile it was the intent of the framers to cede such all encompassing power to the federal government at the expense of the states.

There is at least one distinction between Congress' commerce clause and bankruptcy powers. The commerce clause itself recognizes the need to control the activities of the states, otherwise state regulation could interfere with national economic regulation. Thus, Article I, §8, cl. 3 specifically allows Congress to regulate commerce "among the several states." In a commerce clause setting, a cession of power to Congress to abrogate a state's sovereign immunity may be both necessary to allow Congress to regulate "among the several states" and intended as part of the powers yielded by the states themselves. This principle was recognized in *Union Gas* itself:

> Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be

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[3] Article I, § 8, cl. 18.

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof.

> incomplete without the authority to render states liable in damages, it must be that to the extent that the states gave Congress the authority to regulate commerce, they also relinquished their immunity when Congress found it necessary in exercising this authority to render them liable.

491 U.S. at 19-20 (Brennan J. with Marshall, Blackmun and Stevens J.J., concurring).

In the bankruptcy context however, there is no similar cession of state power. Congress is authorized to provide "uniform laws on the subject of Bankruptcy." It is not authorized to regulate "among the several states."

C. Certiorari Should Be Granted To Overrule This Court's Divided Decision In *Pennsylvania v. Union Gas*.

In all events, the Court should grant certiorari in this case to overrule *Pennsylvania v. Union Gas*.

To the extent cases like *Seminole Tribe* and this case exist, it is because the issue of Congress' power to abrogate touches the core of state sovereignty. The same core of state sovereignty was implicated by the Court's decision in *Chisholm v. Georgia*, 2 Dall., 491 (1793), which led to passage of the Eleventh Amendment.

The Constitution did not originally confer explicit immunity on the States against suits in federal court. However, such immunity was presumed in the context in which the Constitution was adopted. The *Chisholm* decision therefore, which allowed such a suit, "created such a shock

of surprise that the Eleventh Amendment was at once proposed and adopted." *Chavez*, 59 F.3d at 539 (*citing Monaco v. Mississippi*, 292 U.S. 313, 325 (1934)).

In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court construed the Eleventh Amendment. The Court held that its principle was not limited to the specific language of the amendment, but rather "embodied the broader and more fundamental constitutional concept" that suits against unconsenting states were "not contemplated by the Constitution when establishing the judicial power of the United States," *Chavez*, 59 F.3d at 541-542 (citing *Hans*, 134 U.S. at 15.). That principle has remained a bedrock for decision by this Court. *Welch v. State Department of Highways and Public Transportation*, 483 U.S. 468 (1987); *Ex Parte New York*, 256 U.S. 790 (1921) (labelling principle "a fundamental rule of jurisprudence").

The Court, to be sure, has found situations in which state sovereignty has been waived. But in each case, the Court has required the most explicit indicia of waiver. Thus, for example, the Court has recognized explicit legislative waiver by a state of its immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Atascadero State Hosp. v. Salmon*, 473 U.S. 234 (1985). However, the Court found that a state does not waive its immunity in federal court merely by waiving sovereign immunity in its own state courts. *Pennhurst*, 465 U.S. at 99.

Similarly, the Court has found "plan of the convention" waiver where established by historical evidence indicating that such waiver was intended as part of the organic relationship between the state and federal governments established by the Constitution. Thus, the Court has recognized waiver in the "plan of the convention" for suits between states (*South Dakota v. North Carolina*,

192 U.S. 286 (1904), and suits by the United States (*United States v. Texas*, 143 U.S. 621 (1892)). However, the Court has not found such waiver for suits by Indian tribes (*Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578 (1991)), nor for foreign governments (*Monaco, supra*). And while the Court found waiver for claims arising under the Fourteenth Amendment, that was only because of the historical context of the amendment itself. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Finally, the Court has on one occasion found waiver based on a state's participation in economic activity where Congress' consent to participate in such activity required waiver. *Parden v. Terminal Railway of Alabama*, 377 U.S. 184 (1964). However, ever since, the Court has not found waiver in these circumstances, *Employees v. Missouri Dep't. of Public Health and Welfare*, 411 U.S. 279 (1973); *Edelman v. Jordan*, 415 U.S. 651 (1974), and indeed ultimately *Parden* itself was overruled. *See Welch, supra.*

Against this backdrop, the plurality opinion in *Union Gas* should not stand. There is no clear indicia in Article I, other sections of the Constitution, or the "plan of the convention" history that the Framers intended to waive the immunity of the states from suit, as part of the formation of the union. In fact, the public reaction to *Chisholm* and the adoption of the Eleventh Amendment itself indicates just the opposite.

While the plurality in *Union Gas* assumed "in approving the commerce power, the States consented to suits against them based on congressionally created causes of action," (491 U.S. at 22) (Brennan, J.), Justice Scalia properly notes "that principle is too much at war with itself to endure." (491 U.S. at 45 (Scalia J, with Rehnquist C.J., and O'Connor and Kennedy J.J., concurring in part and

dissenting in part")). As noted in *Hans*, the Eleventh Amendment:

> "reflected: a consensus that the doctrine of sovereign immunity for States as well as for the Federal Government was part of the understood background against which the constitution was adopted and which its jurisdictional provisions did not mean to sweep away"

491 U.S. at 32 (Scalia J., with Rehnquist C.J. and O'Connor and Kennedy J.J. concurring in part and dissenting in part). To hold that states consented to congressional abrogation is to repudiate *Hans* itself.

Union Gas rests on an unsound basis. Instead of requiring clear waiver, it assumes it; instead of reflecting history, it negates it; instead of reconciling *Hans*, it rejects the very principle upon which that case was decided. For those reasons, the Court should grant certiorari in this case to overrule *Union Gas*.

CONCLUSION

Wherefore, for the above reasons, certiorari should be granted.

Respectfully submitted,

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September 28, 1995

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-1721

IN THE MATTER OF:
MERCHANTS GRAIN, INCORPORATED,

Debtor

APPEAL OF: EDMUND M. MAHERN,

Trustee for Merchants Grain, Incorporated

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 93 C 187-**Larry J. McKinney**, Judge.

ARGUED SEPTEMBER 19, 1994-DECIDED
JUNE 30, 1995

Before BAUER and MANION, *Circuit Judges*, and *Grant, District Judge.**

GRANT, *District Judge*. Edmund Mahern, as Trustee for Merchants Grain, Inc. (hereinafter "MGI"), initiated an adversary proceeding in the bankruptcy court against the defendants, the Ohio Agricultural Commodity Depositors

Fund and the Ohio Commodity Advisory Commission, seeking to recover alleged preferential transfers made for the benefit of the Fund in the 90 days preceding the filing of MGI's bankruptcy petition under 11 U.S.C. §§ 547 and 550. The defendants asserted an Eleventh Amendment defense, and the bankruptcy court dismissed the proceeding. The district court affirmed, and this appeal followed. For the following reasons, we now REVERSE and REMAND.

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*The Honorable Robert A. Grant of the United States District Court for the Northern District of Indiana is sitting by designation.

I. FACTUAL BACKGROUND

The Ohio Agricultural Commodity Depositors Fund was created by the Ohio legislature to indemnify grain depositors (primarily farmers) who lose money due to the insolvency of commodity handlers licensed by the State of Ohio. The money in the Fund comes from a per-bushel fee paid by the depositors to licensed commodity handlers, who in turn remit the money to the Fund. Pursuant to statute, the Fund is a part of the state treasury, and is administered by the Director of the Department of Agriculture. The Ohio Commodity Advisory Commission was established to aid the Director in his duties with respect to the Fund.

During 1990, MGI operated grain elevators and held commodity handlers licenses in Ohio and several other states. In the fall of 1990, MGI purchased large quantities of grain and other commodities at all of its facilities, including its elevator in Columbus, Ohio. MGI bought much of this grain under deferred pricing contracts, taking title to the grain without paying for it or immediately setting a price. The farmers became unsecured creditors of MGI for the purchase price of the grain, with the right to set that price and collect their money weeks or months later.

On November 8, 1990, the Ohio Department of Agriculture, fearing that MGI was insolvent, conditionally suspended its license. The Department directed MGI to liquidate all grain stored at its Columbus, Ohio facility to cover MGI's obligations to Ohio farmers under its deferred payment contracts.

As a result of the Department's intervention, Ohio farmers were paid over $3 million on antecedent debts within the 90 days preceding MGI's Chapter 11 petition, money which otherwise would have been paid out of the Fund.

Although virtually all Ohio "delayed pricing" depositors were paid as a result of this action, over 700 farmers in three other states, including Indiana, were left with unpaid claims exceeding $19 million.

MGI filed its Chapter 11 petition in bankruptcy on May 9, 1991, and Edmund Mahern was appointed trustee on March 24, 1992. On March 12, 1992, Mr. Mahern initiated an adversary proceeding under 11 U.S.C. §§ 547(b) and 550(a)(1) to recover the preferential transfers made for the benefit of the Fund to Ohio farmers in an amount exceeding $2.7 million. The defendants filed a motion to dismiss, contending that they were immune from suit for monetary damages under the Eleventh Amendment. The bankruptcy court agreed and granted the defendants' motion.

II. THE ELEVENTH AMENDMENT

A. *The Defendants' Relationship to the State*

At the time oral arguments were heard, the sole issue on appeal was whether the Fund and the Commission were "the State of Ohio" for Eleventh Amendment purposes.

The Trustee contends that the key factor in determining whether a state-created entity is "the State" for Eleventh Amendment purposes has always been the source of funds from which its debts and judgments are paid. He maintains that where, as here, the source of funding does not come from the general revenues of the State, the entity is not an "arm of the State" and, therefore, is not immune from suit.

The bankruptcy court concluded, however, that the real party in interest in this case was clearly the State of Ohio, and that the source of funds from which the recovery

would come was, therefore, irrelevant. *Paschal v. Jackson*, 936 F.2d 940, 944 (7th Cir. 1991), *cert. denied*, 502 U.S. 1081 (1992). We agree.

Where a state-created entity gets the money to pay its debts, including any judgments which may be entered against it, is relevant to an Eleventh Amendment inquiry if the nature of the entity in question is unclear. See *Hess v. Port Authority Trans-Hudson Corp.*, ____ U.S. ____, 115 S.Ct. 394, 402-406, 130 L.Ed.2d 245 (1994); *Mercer v. Magnant*, 40 F.3d 893, 898-99 (7th Cir. 1994); *Paschal*, 936 F.2d at 944. There can be no doubt in the present case, however, that the State of Ohio is the real party in interest.

Under Ohio law, the Fund is a part of the state treasury, O.S.C. § 926.16(A), and is administered by the Director of the Ohio Department of Agriculture (a state official acting is his official capacity and compensated by the State). O.S.C. § 926.16(D); *Emerson v. Seville Elevator Co.*, 526 N.E.2d 95, 95 (Oh. App. 1987). All claims for indemnification from the Fund are filed with the Director, who assesses the validity of the claim and provides for payment. O.S.C. §§ 926.18(A) and (C). Pursuant to § 926.18(D), "all disbursements from the [F]und shall be paid by the treasurer of state pursuant to vouchers authorized by the Director." Commission members are appointed by the Director of Agriculture, and serve only in an advisory capacity. O.S.C. § 926.32(A). The Director designates who serves as chairman of the Commission, and may, after notice and public hearing, remove any member for neglect of duty or malfeasance in office. O.S.C. § 926.32(B). The Director provides the meeting space, assistance, services, and data necessary to enable the Commission to carry out its functions. O.S.C. § 926.32(G). The Director also designates "an official or employee of the department of agriculture to act as the executive secretary of the

commission." O.S.C. § 926.32(I). All costs of the Commission, including all of the expenses of its members and consultants, are paid from the commodity handler regulatory program fund created in section 926.19 pursuant to itemized vouchers which must be approved by the Director. O.S.C. § 926.32(H). O.S.C. § 926.19(c) expressly provides that: "If at any time the moneys deposited in the [regulatory program] fund . . . are not sufficient to pay the examination and administrative costs of this chapter, the director shall request an appropriation *from the general revenue fund* to pay those costs." (Emphasis added).

The relationship between the defendants and the State of Ohio is further clarified in § 926.33(B), which provides:

This chapter is enacted *for the benefit of the state*, and neither the state, its departments, agencies, or commissions, or its employees and officials either elected or appointed, shall be held liable for any injuries to third parties, for the exercise of their authority, or for the use of their discretion on the matters to which this chapter relates.

Section 926.33 thus evidences a clear intent to bring the Fund and the Commission within the protections accorded the State under the doctrine of sovereign immunity. As the bankruptcy court aptly noted: "The state treasurer and the Director, sued in his or her official capacity, and the Department of Agriculture would no doubt be considered 'the state' for Eleventh Amendment purposes (which is probably why none were named as a party)." See *Mercer*, 40 F.3d at 899 ("a state official sued in an official capacity . . . is treated as a 'state'"); *Allinder v. State of Ohio* 808 F.2d 1180, 1184 (6th Cir. 1987) (Ohio Department of Agriculture and Director of Department, when sued in his official capacity, are the "State" for purposes of asserting Eleventh Amendment immunity).

Given the plain language of the Ohio statutes, any judgmen rendered against the Fund or the Commission would effectively b a judgment against the State of Ohio. "Where the state gets th money to pay [that] judgment . . . is irrelevant . . ." *Mercer*, 4 F.3d at 899 (citing *Alabama v. Pugh*, 438 U.S. 781 (1978)) *Paschal*, 936 F.2d at 944.

B. Abrogation of Immunity Under 11 U.S.C. §106

"[A]bsent waiver by the State or valid congressiona override," the Eleventh Amendment would have barred th Trustee's action against the Fund and the Commission. *Kentuck v. Graham*, 473 U.S. 159, 169 (1985). The Bankruptcy Code however, contained a waiver provision at the time the defendants filed their motion. 11 U.S.C. § 106 provided that:

(a) A governmental unit is deemed to have waived sovereig immunity with respect to any claim against such governmental uni that is property of the estate and that arose out of the sam transaction or occurrence out of which such governmental unit' claim arose.

(b) There shall be offset against an allowed claim or interest o a governmental unit any claim against such governmental unit tha is property of the estate.

(c) Except as provided in subsections (a) and (b) of this sectio and notwithstanding any assertion of sovereign immunity--

> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

While subsections (a) and (b) unequivocally provided for a waiver of immunity when the "governmental unit" had filed a proof of claim and thereby consented to being sued, *United State v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992); *Hoffman v Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 101-10 (1989); *In re Price*, 42 F.3d 1068, 1070 (7th Cir. 1994); *In re Midway Airlines, Inc.*, 175 B.R. 239, 244 (Bankr. N.D. Ill. 1994) there was no indication in the present case that the State of Ohi had ever filed a claim against the bankruptcy estate. Which lef subsection (c) as the Trustee's only line of defense.

In *In re McVey Trucking*, 812 F.2d 311, 326-327 (7t Cir.), *cert. denied*, 484 U.S. 895 (1987), we held that § 106(c clearly applied to preference avoidance actions initiated against a governmental unit under § 547(b), and unequivocally waived th government's right to assert sovereign immunity as a bar to th proceeding. When the issue came before the Supreme Court tw years later, however, the Court took a different viewpoint, an held that § 106(c) did not contain the express and unequivoca language required to effectively abrogate the Eleventh Amendmen immunity of the States. *Hoffman*, 492 U.S. at 100-104. See als *Nordic Village*, 503 U.S. at 33-37.

Citing *Nordic Village* and *Hoffman* as controlling authority the bankruptcy court held that, absent the State's consent, th Eleventh Amendment barred the Trustee's action to recover th preferential transfers. While that was a correct statement of th law at the time the bankruptcy court issued its decision, the la has since changed.

On October 22, 1994, a month after oral arguments ha been completed in this case, the Bankruptcy Reform Act of 1994 Pub. L. No. 103-394, 108 Stat. 4106 (1994), was enacted. On of the key changes effected was the amendment of § 106.

Pursuant to section 113 of the Reform Act, 11 U.S.C. 106(c) was amended and recodified as § 106(a), and provides:

Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity *sovereign immunity is abrogated as to a governmental unit* to th extent set forth in this section *with respect to* the following:

> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, *547*, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title. . .
>
> .

(Emphasis added). 11 U.S.C. § 106(a) (as amended Pub. L. 103 394, Title I, § 113, Oct. 22, 1994, 108 Stat. 4117). Th amendment was intended to effectively overrule *Nordic Village* an *Hoffman*, and to "clarify[] the original intent of Congress i enacting Section 106 of the Bankruptcy Code with regard t sovereign immunity." 140 Cong. Rec. H10752-01, H10772 an H10766. Congress accordingly provided that § 113 was to b applied retroactively to bankruptcy cases which were "commence *before* . . . the date of the enactment". Pub.L. 103-394, 702(b)(2)(B) of the Reform Act (set out as a note under 11 U.S.C § 101).

The defendants do not dispute the fact that the abrogatio language in § 106(a) as amended is express and unequivocal, bu rather contend that the abrogation provision is invalid becaus Congress has no authority under the Bankruptcy Clause, Art. I, 8, cl. 4, to abrogate the States' Eleventh Amendment immunity According to the defendants, Congress can override the Eleventl

Amendment only when it acts pursuant to § 5 of the Fourteenth Amendment. Defendants contend, in the alternative, that even if Congress has the power, it cannot exercise it retroactively. We disagree.

That Congress can abrogate the States' Eleventh Amendment immunity when it acts pursuant to the plenary powers accorded it under § 5 of the Fourteenth Amendment is not disputed. See *Dellmuth v. Muth*, 492 U.S. 223, 227 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). The question before us is whether it may also do so under its Article I plenary powers. We held that it can in *McVey Trucking*, concluding that there was no constitutional basis for distinguishing between the plenary powers accorded Congress under the Fourteenth Amendment and those accorded under Article I. *McVey Trucking*, 812 F.2d at 316-323. Accord *United States v. Union Gas Co.*, 832 F.2d 1343, 1352 (3d Cir. 1987), *aff'd*, 491 U.S. 1 (1989); *County of Monroe v. Florida*, 678 F.2d 1124 (2d Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Peel v. Florida Dept. of Transportation*, 600 F.2d 1070, 1080-81 (5th Cir. 1979); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979). The Supreme Court reached the same conclusion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

Justice Brennan, who authored the plurality opinion in which Justices Marshall, Blackmun, and Stevens joined, concluded that:

Like the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States . . . that is the meaning, in fact, of a "plenary" grant of authority, and the lower courts have rightly concluded that it makes no sense to conceive of § 5 [of the Fourteenth Amendment] as somehow being an "ultraplenary" grant of authority. See, *e.g.*, *In re McVey Trucking*, *supra*, at 316.

Union Gas, 491 U.S. at 16-17. Justice White cast the fifth and decisive vote, concluding that Congress did indeed have the authority under Article I to abrogate the States' Eleventh Amendment immunity. *Union Gas*, 491 U.S. at 57 (White, J. concurring).

The defendants are quick to point out, however, that there was a vehement dissent in *Union Gas*. Justice Scalia, who authored the dissent on behalf of Chief Justice Rehnquist and Justices O'Connor and Kennedy, would hold that state immunity from suit in federal courts is a "structural component of federalism" that Congress cannot alter by legislation enacted pursuant to its Article I powers. *Union Gas*, 491 U.S. at 29-45 (Scalia, J., dissenting, joined by Rehnquist, C.J., and O'Connor and Kennedy, J.J.). See also *Hoffman*, 492 U.S. at 105 (Scalia and O'Connor, JJ., concurring). The dissent reasoned that:

[I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers. An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable. The Fourteenth Amendment, on the other hand, was avowedly directed against the power of the States, and permits abrogation of their sovereign immunity only for a limited purpose.

Union Gas, 491 U.S. at 42.

The defendants contend that *Union Gas* was wrongly decided and should not be considered controlling authority in this case. They note that the composition of the Court has changed significantly since the decision was handed down, with the majority losing two key votes, and surmise that it is only a matter of time before the dissent's viewpoint becomes the law of the land and *Union Gas* is overturned. The defendants accordingly urge us

to adopt what they perceive to be the law of the future. We mus decline the invitation.

As the First Circuit noted in *Reopell v. Commonwealth o Massachusetts*, 936 F.2d 12, 15-16 (1st Cir.), *cert. denied*, 50 U.S. 1004 (1991): "The battle may not yet be ended, but we ar constrained to accept the Court's majority pronouncements." Se also *In re York-Hannover Developments, Inc.*, 181 B.R. 27 (Bankr. E.D.N.C. April 18, 1995). It is the Court's holding, no the identities of the justices joining in it, that creates *stare decisis* See *Payne v. Tennessee*, 501 U.S. 808, 844-45, 851-55 (1991 (Marshall, J., and Blackmun, J., dissenting).

When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holdin of the Court may be viewed as that position taken by thos Members who concurred in the judgments on the narrowes grounds. . . ."

Marks v. United States, 430 U.S. 188, 193 (1977) (quoting *Greg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart Powell, and Stevens, J.J.)). It should thus come as no surpris that virtually every Court of Appeals to have reached the issu since *Union Gas* has concluded that Congress has the authority t abrogate the States' immunity from suit when legislating pursuan to the plenary powers granted it under Article I of th Constitution. See, *e.g.*, *Ponca Tribe of Oklahoma v. State o Oklahoma*, 37 F.3d 1422, 1429-30 (10th Cir. 1994), *petition fo cert. filed*, 63 U.S.L.W. 3477 (Dec. 9, 1994); *Brinkman v. Dept of Corrections of the State of Kansas*, 21 F.3d 370, 371-72 (10t Cir.), *cert. denied*, 115 S. Ct. 315 (1994); *Reich v. State of Ne York*, 3 F.3d 581, 590 (2d Cir. 1993), *cert. denied*, 114 S.Ct 1187 (1994); *Hale v. State of Arizona*, 993 F.2d 1387, 1391 (9t Cir.), *cert. denied*, 114 S.Ct. 386 (1993); *State of New York v United States*, 942 F.2d 114, 121 (2d Cir. 1991), *aff'd in part an*

rev'd in part, 112 S.Ct. 2408 (1992); *Reopell*, 936 F.2d at 15-16 We find no basis for holding otherwise today.

The defendants' perfunctory challenge to the retroactiv application of § 113 deserves little comment. The Fund an Commission contend that they would be unduly prejudiced if th amendment were to be applied retroactively to their case becaus it would allow the Trustee to pursue a cause of action whic otherwise would have been barred by the applicable statute c limitations. They are incorrect.

The issue before the court is not whether the change in th law effected by the Reform Act would allow the Trustee to brin a *new* adversary proceeding against the defendants, but whether precluded dismissal of the old one. If the retroactive applicatio of § 113 is constitutional, and we must presume that it is, *Pensio Benefit Guaranty Corp. v. R.A. Gray & Co.* 467 U.S. 717, 72 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-2 (1976), the judgment of dismissal must be reversed.[2] *Plant v Spendthift Farm, Inc.*, ____ U.S. ____, 115 S.Ct. 1447, 145 (1995) (when Congress has expressly provided that a new law i to be applied retroactively we "must apply that law in reviewin

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[1]But see *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1023 (11th Cir. 1994) (recognizing that Congress has specifically abrogated the Eleventh Amendment defense when legislating pursuant to §5 of the Fourteenth Amendment and its Article I, §8 plenary power over commerce, but refusing to extend authority to abrogate to legislation enacted pursuant to the Indian Commerce Clause (the Indian Gaming Regulatory Act)).

[2]To the extent 11 U.S.C. §106(a) could be read to require federal courts to reopen final judgments entered before the Reform Act was enacted, it may indeed be subject to a constitutional challenge, see *Spendthrift Farms*, 115 S.Ct. 1447, 1451-1463 (1995). That is not the case before us, however, as the judgment of the Bankruptcy Court is not yet final.

judgments still on appeal that were rendered before the law wa enacted, and must alter the outcome accordingly"). See als *United States v. Schooner Peggy*, 1 Cranch 103, 109 2 L.Ed. 4 (1801); *Landgraf v. USI Film Products*, ____ U.S. ____, 11 S.Ct. 1483, 1500-1508 (1994); *Carpenter v. Wabash R. Co.*, 30 U.S. 23 (1940) (amendment to Bankruptcy Act effected while cas was pending on petition for writ of certiorari given effect wher amendment expressly provided for retroactive application); *In r Anton Motors, Inc.*, 177 B.R. 58 (Bankr. D. Md. Jan. 11, 1995 (section 106 as amended by the Bankruptcy Reform Act of 199 applicable where bankruptcy case commenced before the statute' enactment, and even though statute of limitations for initiatin adversary proceedings expired before the change in the law wa effected); but see *In re Bison Heating & Equipment, Inc.*, 17 B.R. 785 (Bankr. W.D.N.Y. Feb. 7, 1995).

"A challenged statute is constitutional so long as it retroactive application--like any future application is justified by 'legitimate legislative purpose furthered by rational means.'" *Lon Island Oil Products Co., Inc. v. Local 553 Pension Fund*, 77 F.2d 24, 27 (2d Cir. 1985) (quoting *Pension Benefit Guaranty* 467 U.S. at 729). The burden is on the defendants in this case, a the parties asserting a constitutional violation, to establish tha Congress acted in an arbitrary and irrational manner. See *Turne Elkhorn Mining Co.*, 428 U.S. at 15. The defendants' unfounde allegations of prejudice fall far short of the mark.

Defendants do not dispute the fact that the retroactiv application of § 113 furthers a legitimate legislative purpose, no could they. Section 113 was applied retroactively for a ver simple reason: Congress had always intended 11 U.S.C. § 106 t be a comprehensive waiver of sovereign immunity and wanted t clarify that point once and for all. 140 Cong. Rec. H10752-01 H10772 and H10766. In doing so, Congress effectively advance the general purpose of the bankruptcy system by "enforcing distribution of the debtor's assets in an orderly manner in whic

the claims of all creditors are considered fairly, in accordance witl established principles rather than on the basis of the insid influence or economic leverage of a particular creditor." H.R REP. 103-835. State and Federal governments "must abide by th regular processes of the bankruptcy court applicable to al claimants." 140 Cong. Rec. H10752-01, H10772.

III. Conclusion

We conclude on the basis of the foregoing discussion tha Congress has the authority to abrogate the Eleventh Amendmen when it acts pursuant to the powers accorded it under th Bankruptcy Clause, Art. I, § 8, cl. 4; that it expressly an unequivocally did so when it enacted § 113 of the Reform Act, 1 U.S.C. § 106; and that § 113 applies retroactively to this case Accordingly, the judgment is REVERSED and the caus REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

FILED MARCH 7, 1994

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

EDMUND M. MAHERN, TRUSTEE FOR MERCHANTS GRAIN, INC.,	)	
Appellant,	)	Cause No IP 93 187 C
v.	)	
THE OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND, and THE OHIO COMMODITY ADVISORY COMMISSION,	)	
Appellees,	)	
IN RE: MERCHANTS GRAIN, INC.,	)	BANKR. NO 915047RMV-1
Debtor.	)	
EDMUND M. MAHERN, TRUSTEE, FOR MERCHANTS GRAIN, INC.	)	

Plaintiff,	)	
	)	
v.	)	ADVERSARY
	)	NO. 92-123
THE OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND AND THE OHIO COMMODITY ADVISORY COMMISSION,	)	
	)	
Defendants.	)	

ORDER ON APPEAL FROM BANKRUPTCY COURT

The appellant, Edward M. Mahern, Trustee for Merchants Grain, Inc. ("Merchants"), has filed an appeal from the Bankruptcy Court. Both Merchants and the appellees, the Ohio Agricultural Commodity Depositors Fund (the "Ohio Fund") and the Ohio Commodity Advisory Commission (the "Ohio Commission") (collectively referred to as the "Ohio Fund & Commission"), have filed their briefs, and the issues raised by Merchants' appeal are ready to be resolved. For the reasons discussed below, this Court AFFIRMS the decision of the Bankruptcy Court.

I. FACTUAL & PROCEDURAL BACKGROUND

Merchants' business is buying and storing grain. During 1990 Merchants operated grain elevators and held grain licenses from several states, including Ohio. During the fall of 1990, Merchants bought large quantities of grain at, among other locations, its elevators in Columbus, Ohio. These purchases were, for the most part, "delayed pricing" purchases, under which Merchants took title to the grain without paying for it or immediately setting a price.

On November 8, 1990, the Ohio Department of Agricultur ("ODA") conditionally suspended Merchants' Ohio license, an ordered Merchants to cover all obligations it had to Ohi depositors on "delayed pricing" purchases with the grain tha Merchants had on hand. The proceeds from the sale of that grai were placed in an account at Star Bank in Columbus, Ohio. Th Ohio depositors were paid from that account and Merchants account at BancOhio National Bank. Although virtually all Ohi "delayed pricing" depositors were paid as a result of this action over 700 farmers in three other states were left with unpaid claim exceeding $19 million.

The Ohio Fund was created as part of the state treasury t be used exclusively to indemnify commodity sellers who los money as a result of the insolvency of Ohio-licensed commodit handlers such as Merchants. *See* Ohio Rev. Code Ann. § 926.16 Under Ohio law, the Ohio Commission, whose members appointe by the director of the ODA, is charged with establishing the dolla value of claims against the Ohio Fund filed with the director o ODA. *See id*. §§ 926.18 and 926.32.

On May 9, 1991, Merchants initiated a Chapter 1 bankruptcy in the United States Bankruptcy Court for the Southern District of Indiana. On March 12, 1992, Merchants initiated a adversary proceeding against the Ohio Fund & Commission t recover certain preferential transfers which were for the benefit o the Ohio Fund & Commission. Specifically, Merchants claims tha the money it paid to the Ohio depositors shortly before it bankruptcy resulted in the Ohio Fund & Commission avoidin having to reimburse Ohio depositors for over $2.7 million in los funds. In response to the adversary action complaint, the Ohi Fund & Commission filed an answer which raised as a defense th Eleventh Amendment's prohibition of suits brought against a Stat in federal court. On September 9, 1992, the Ohio Fund & Commission filed a motion to dismiss the adversary proceedin based on its Eleventh Amendment defense. The Bankruptcy Cour

heard oral argument on the motion, and on February 4, 1993 issued its decision dismissing Merchants' claim.

II. THE BANKRUPTCY COURT'S DECISION

The Bankruptcy Court ruled that the Ohio Fund & Commission was the alter ego of the State of Ohio, and thus protected by the Eleventh Amendment. In analyzing the issue, th Bankruptcy Court noted:

In this case the [Ohio] Fund is part of the Ohio state treasury albeit a segregated part, and payments from the [Ohio] Fund ar made by the Treasurer. While the [Ohio] Commission has som role in the claims process, the director of the [ODA], a departmen of state administration, is generally charged with administering th statute regulating agricultural commodity handlers, including th provisions relating to the [Ohio] Fund, and it is the director wh provides for payment of valid claims against the [Ohio] Fund. Th state treasurer and the director, sued in [their] official capacity and the [ODA] would no doubt be considered "the state" fo Eleventh Amendment purposes.

Order Granting Mot. to Dismiss at 8-9 (citations to portions of th Ohio Rev. Code Ann. omitted). The Bankruptcy Court rejecte Merchants' argument that the Eleventh Amendment does not appl in this case because the Ohio Fund is segregated from Ohio' general funds.

III. STANDARD OF REVIEW

In reviewing a decision of the Bankruptcy Court, this Cou must accept that court's findings of fact unless the findings ar clearly erroneous; however, conclusions of law are reviewe *de novo*. *See In re Roberson*, 999 F.2d 1132, 1137 (7th Ci 1993); Bank. R. 8013. As Merchants correctly points out, th Bankruptcy Court decision which is the subject of review in thi

case involved no findings of fact. Therefore, this Court's review of the Bankruptcy Court's decision involves only questions of law which are considered *de novo*.

IV. DISCUSSION

The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although it appears to be beyond question that the Eleventh Amendment's protection applies to suits against "an agency of state government such as a state department of health or treasury," the cases which address whether a state agency, board, commission, and other entities are protected by the Eleventh Amendment have produced case law that is inconsistent and uncertain. Erwin Chemerinsky, *Federal Jurisdiction* 342 (1989). Generally, however, courts employ an analysis which considers four factors:

(1) Will a judgment against the entity be satisfied with funds in the state treasury?

(2) Does the state government exert significant control over the entity's decisions and actions?

(3) Does the state executive branch or legislature appoint the entity's policymakers?

(4) Does the state law characterize the entity as a state agency rather than as a subdivision?

Id. at 343. Usually the most important factor is the first factor - whether the funds sought are part of the state treasury. *See id.*

This Court concurs fully with the Bankruptcy Court's analysis of the statutory provisions creating the Ohio Fund & Commission, and likewise concludes that under those provisions the Ohio Fund & Commission is the alter ego of Ohio and entitled to the Eleventh Amendment's protection. However, in addition to challenging the Bankruptcy Court's statutory analysis, Merchants asks this Court to recognize the "trust fund doctrine," which provides that the Eleventh Amendment does not protect state funds that are sufficiently segregated from a state's general fund. *See Paschal v. Jackson*, 936 F.2d 940, 943 (7th Cir. 1991) (describing the "trust fund doctrine"), *cert denied*, 112 S. Ct. 992 (1992) (White, J. dissenting from denial of certiorari because of the conflict among the federal courts over whether to adopt the "trust fund doctrine"). In reaching its decision that the defendants in this case are protected by the Eleventh Amendment, the Bankruptcy Court properly followed Seventh Circuit law on the issue, which rejects the "trust fund doctrine." *See Paschal*, 936 F.2d at 943-45. Finding no basis for straying from controlling precedent, this Court finds that the Bankruptcy Court did not err, and AFFIRMS the dismissal.

IT IS SO ORDERED this 28th day of February, 1994

(signature)
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution attached

Distribution to:

James M. Carr
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	)	BANKRUPTCY NO.
	)	91-5047-RWV-11
MERCHANTS GRAIN, INC.	)	
	)	
DEBTOR.	)	
	)	
MERCHANTS GRAIN, INC., BY AND THROUGH TRUSTEE, EDMUND M. MAHERN,	)	Adversary Proceeding No. 92-123
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
THE OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND AND THE OHIO COMMODITY ADVISORY COMMISSION,	)	
	)	
Defendant.	)	

ORDER GRANTING MOTION TO DISMISS

This matter comes before the Court on the Defendants' Motion to Dismiss Adversary Proceeding ("the Motion to Dismiss") filed on September 11, 1992, by the Defendants, The Ohio Agricultural Commodity Depositors Fund ("the Fund") and the Ohio Commodity Advisory Commission ("the Commission"). The Court now grants the motion for the following reasons.

Background

The Debtor is in the business of buying and storing grair On May 9, 1991, the Debtor, through a state court appointe receiver, filed for relief under Chapter 11 of the Bankruptcy Code The receiver, Edmund M. Mahern, was thereafter appointe Chapter 11 Trustee.

The Debtor, through the receiver, initiated this adversar proceeding on March 12, 1992, by filing its Complaint to Avoi and Recover Preferential Transfers ("the Complaint"). (After th receiver's appointment as Trustee, the Trustee was substituted a plaintiff, and thus shall be referred to as the plaintiff.) In th Complaint, the Trustee asserts that the Fund is established unde Ohio law to compensate Ohio commodity depositors ("depositors" who incur financial losses as a result of storing and sellin agricultural commodities to licensed insolvent commodity handlers that the Commission is established under Ohio law to supervis and administer the Fund, that the Fund and Commission ar obligated to reimburse each depositor in full for the firs $10,000.00 of loss and for 80 percent of any loss in excess c $10,000.00, that in the 90 days prior to bankruptcy, the Debtc paid depositors who were creditors of the Debtor $3,165,279.5 ("the transfers"), that such transfers are avoidable preference under 11 U.S.C. section 547, and that under 11 U.S.C. sectio 550, the Trustee is entitled recover the value of the transfers eithe from the depositors or from an entity for whose benefit th transfers were made, that the transfers benefited the Fund and th Commission in the amount of $2,785,801.68, and that the Truste is therefore entitled to recover this amount from the Fund and th Commission.

In the Motion to Dismiss, the Defendants contend that th Trustee's action is barred by the doctrine of sovereign immunity asserting that the State of Ohio, and the Fund and the Commissio as its agencies, are immune from this suit under the Elevent Amendment to the United States Constitution. The Truste contends that the Defendants are not alter egos of the State c

Ohio, that recovery would not come out of the public purse, and that the doctrine of sovereign immunity does not protect the Defendants.

The Commission and the Fund under Ohio Law

The Commission and Fund were created in a chapter of the Ohio statutes regulating agricultural commodity handlers. *See* Ohio Revised Code, sec. 926.32(A) and 926.16(A). Regarding the Fund, Ohio law provides:

> There is hereby created in the state treasury the agricultural commodity depositors fund. The state shall not be held liable for any claims presented against the fund under section 926.18 of the Revised Code. The fund shall consist of a per-bushel fee remitted by licensed handlers under this section, any sums that the director of agriculture may collect by any legal action on behalf of the fund, and any property of securities acquired through the used of moneys in the fund. The moneys collected under this section and deposited in the fund shall be used exclusively to indemnify depositors as provided in section 926.18 of the Revised Code and for no other purpose.

Ohio Revised Code, sec. 926.16(A).

Section 926.18 of the code provides the procedures by which depositors may make a claim against the Fund and by which the Fund pays such claims. The Commission has certain responsibilities in the claims process, such as determining the dollar value of claims, however, a depositor makes a claim with the director of agriculture ("the Director") rather than with the Commission, the Director, with the Commission's approval determines the validity of claims, the Director provides fo

payment of valid claims from the Fund, and all disbursement from the Fund are paid by the state treasurer pursuant to voucher authorized by the Director. *See* sec. 926.18(A) and (C), and 926.16(D). The Director is charged with administering the code chapter governing agricultural commodity handlers, which includes the provisions pertaining to the Fund. *See* sec. 926.02.

The department of agriculture, which the Director administers, is one of the departments of state administration. *See* sec. 121.01 and 121.02(E).

General Eleventh Amendment Principles

The Eleventh Amendment to the Constitution of the United States provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The scope of a State's immunity is broader than the language of this Amendment may suggest. For instance, while the Eleventh Amendment does not by its terms bar suits against a State by its own citizens, the U.S. Supreme Court has consistently held that an unconsenting State is immune of suit in federal court by its own citizens. *See Edelman v. Jordan*, 415 U.S. 651, 662-6 (1974), In addition, the rule has evolved that even if a State is no named a party to an action, "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.* at 663 A State may waive its constitutional protection under the Eleventh Amendment, but such waiver will be found only where stated "by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable

construction." *Id.* at 673, *quoting Murray v. Wilson Distillin Co.*, 213 U.S. 151 (1909). Thus, the Eleventh Amendment wa held to bar suit in federal court by Illinois citizens against Illinoi state officials for retroactive payment of public assistance benefit wrongfully withheld. *See Edelman*, 415 U.S. at 678.

The Source of Funds from which Recovery is Sought

The Trustee attempts to distinguish *Edelman* from this cas primarily on the source of funds from which recovery is sought citing *Miller-Davis Co. v. Illinois State Toll Highway Authority* 567 F.2d 323 (7th Cir. 1977). In that case, a contractor sued th Illinois State Toll Highway Authority ("the Authority") for breac of contract. The Seventh Circuit, relying of *Edelman* and pric Supreme Court authority, stated that "[c]ritical in determinin whether a state agency . . . is in fact the alter ego of the state an therefore entitled to the protection of the Eleventh Amendment i whether, in the event plaintiff prevails, judgment will have to b paid out of the state treasury." *Miller Davis*, 567 F.2d at 327 Noting that the Authority was funded solely by bonds and tolls that the state had expressly disclaimed any responsibility fc repayment of the bonds, and that the Authority's fund wa segregated from general state revenues, the court rejected th Authority's Eleventh Amendment defense, holding that an judgment against the fund would not be a judgment against th state. *Id.*

The Defendants point out, however, that *Miller-Davis* is nc the Seventh Circuit's most recent word on the Elevent Amendment. In *Paschal v. Jackson*, 936 F.2d 940 (7th Cir 1991), *cert. denied*, 112 S. Ct. 992 (1992), unemploymer insurance claimants challenged the method by which the Illinoi Department of Employment Security ("IDES") administered a extended benefits ("EB") program and a federal supplement compensation ("FSC") program. Although the claimants prove two violations, the district court dismissed the claims fc

retroactive relief on Eleventh Amendment grounds. *See id.* a 941. Given the joint state and federal method of funding thes programs, the claimants argued that the Eleventh Amendment i inapplicable because any award of FSC would be paid wholly fron federal funds, any award of EB would come half from the federa treasury and half from a segregated fund, and the state acts merel as the federal government's agent for collecting and disbursing par of the revenues necessary to operate the unemployment insuranc program. *See id.* at 941-943.

The Seventh Circuit noted that the claimants' "trust fun doctrine" was supported by *Miller-Davis* and other authority including several cases allowing past unemployment claims on th basis that the state's unemployment compensation fund wa sufficiently segregated from the general revenue fund. *See id.* a 943-44. The court, however, took a different view, stating:

We . . . have great difficulty with the view that a state' fiscal structure is dispositive of whether one can sue the state fo accrued benefits. Examining the source of funds once might hav proven useful in identifying the real party in interest, but such a examination is of little consequence in determining whethe damages should be paid. It is a complete waste of time to engag in the niceties of determining whether a particular department o a state is "[one] of the United States" for eleventh amendmen purposes when the lawsuit is against the state and judgment will b entered against the state as an entity. We prefer an approach tha disregards the source of state funds. To do otherwise forces court to engage in a detailed audit of the defendant's finances t determine whether the defendant department or subdivision i indeed "the state." The district court hit the nail on the head "Where Illinois gets the money to satisfy a judgment is of n concern of the plaintiff or the court; what matters is that th judgment runs against the state."

Id. at 944 (citation omitted).

The Trustee seeks to distinguish *Paschal* by arguing that the Seventh Circuit disregarded the source of funds only because the state itself was party to the suit. As the district court decision reveals, all the defendants were state officials sued in their official capacity, which made the suit, in essence, one against the state. *See Cosby v. Jackson*, 741 F. Supp. 740, 742 (N.D. Ill. 1990). The district court found the *Miller-Davis* inquiry into the source of funds useful only if there were doubt as to whether a particular defendant, such as a special purpose district or agency, is "the state" for Eleventh Amendment purposes. *See id* at 743. In *Miller-Davis*, the defendant was outside the direct chain of control of the state executive branch and without access to the state's treasury. *See id*. By contrast, the IDES is a line agency of the executive branch answerable to the governor, which "[n]o one doubts" is a part of the state. *See id*.

Paschal, which wholeheartedly affirmed the lower court's ruling and reasoning, thus instructs that the source of funds from which recovery is sought is relevant only to the inquiry of whether a defendant *is* "the state" protected by the Eleventh Amendment not in determining whether recovery is permissible *from* the state.

Two pre-*Paschal* cases cited by the Trustee found that the Illinois State Employees' Retirement System was not an alter ego of the state, and thus unprotected by the Eleventh Amendment based in part on inquiring into the source of its funds. *See In re Lyons*, 118 Bankr. 634 (C.D. Ill. 1990), *aff'd on alternative grounds*, 957 F.2d 444 (7th Cir. 1992); *In re Groves*, 120 Bankr. 956 (Bankr. N.D. Ill. 1990). These cases, however, were making the permissible *Miller-Davis* alter ego inquiry, and in any case now have precedential value in this circuit only to the extent that their reasoning conforms with *Paschal*.

The Defendant as "the State" under the Eleventh Amendment

In this case, the Fund is part of the Ohio state treasury albeit a segregated part, and payments from the Fund are made b the state treasurer. *See* Ohio Revised Code, sec. 926.16(A) an (D). While the Commission has some role in the claims process the Director of the department of agriculture, a department of stat administration, is generally charged with administering the statut regulating agricultural commodity handlers, including th provisions relating to the Fund, and it is the Director who provide for payment of valid claims against the Fund. *See* sec. 121.1C 121.02(E), 926.02, 926.16(D), 926.18. The state treasurer an the Director, sued in his or her official capacity, and th department of agriculture would no doubt be considered "the state for Eleventh Amendment purposes (which is probably why non were named as a party). The Court thus concludes that the rea party in interest in this case is "the state" for Eleventh Amendmer purposes, and thus the source of funds from which recovery woul come is irrelevant to the Defendants' Eleventh Amendment clair to immunity.

Waiver or Abrogation of Immunity under the Bankruptcy Code

Miller-Davis and *Paschal* were non-bankruptcy cases an thus do not address the issue of what effect the Bankruptcy Cod or Congress's bankruptcy powers may have on a state's Elevent Amendment immunity. The Seventh Circuit addressed this issu in *In re McVey Trucking, Inc.*, 812 F.2d 311 (7th Cir.), *cer denied*, 484 U.S. 895 (1987), in which the debtor brought preference action against the Secretary of State of Illinois t recover money the debtor claimed had been wrongfully transferre for prospective highway use and flat-weight taxes. Responding t the secretary's Eleventh Amendment defense, the court conclude that Congress may abrogate state sovereign immunity when exercises any of its plenary powers, including its powers under th bankruptcy clause of Article I, section 8 of the Constitution, an that "in enacting [11 U.S.C.] sec. 547(b) Congress had the powe to create a cause of action for money damages enforceable again

an unconsenting state in federal court." *See id.* at 320-23. Next the court concluded that Congress did indeed intend to exercis this power through 11 U.S.C. sections 106(c) and 547(b), and thu unconsenting states were subject to preference actions. *See id.* a 326-27.

McVey, however, has since been undermined by tw Supreme Court cases. In *Hoffman v. Connecticut Department o Income Maintenance*, 492 U.S. 96 (1989), the high court rejecte a trustee's preference action against a state which had not filed claim against the estate, with a majority finding with that i enacting 11 U.S.C. section 106(c), Congress did not abrogate state's Eleventh Amendment immunity, or concluding tha Congress had no power to abrogate such immunity through it Article I powers. In *U.S. v. Nordic Village, Inc.*, 112 S.Ct. 110 (1992), a case against the federal government, the majorit concluded that section 106(c) does evidence Congress's intent t waive governmental immunity from a bankruptcy trustee's claim for monetary relief.

The Court thus concludes that the Bankruptcy Code doe not abrogate a state's sovereign immunity from suits for monetar relief, if the state has not filed a claim against the estate. (Th Trustee does not contend that the State of Ohio has filed such claim or has otherwise come within the immunity waive provisions of 11 U.S.C. section 106(a) or (b).)

Conclusion

The Court holds that the Defendants are immune under th Eleventh Amendment from this preference action in this federa forum. The Court therefore GRANTS the Motion to Dismiss an ORDERS this adversary proceeding dismissed.

SO ORDERED, at Indianapolis, Indiana, this 4th day c February, 1993.

(signature)
RICHARD W. VANDIVIER
Bankruptcy Judge

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No. 95-561

(2)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THE OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND, *et al.*,
Petitioners,

v.

EDMUND M. MAHERN, TRUSTEE FOR MERCHANTS GRAIN, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this case present a case or controversy under Article III of the United States Constitution?

2. If this case does present an Article III case or controversy, does the absence of a significant economic or other interest in its outcome impair its value as a vehicle to decide important constitutional issues?

3. Can the Court reach the issue of Congress' right to expose states to bankruptcy preference actions without first deciding whether the Petitioners are the State of Ohio for Eleventh Amendment purposes?

4. Should this Court decide the issue of Congress' right to expose states to bankruptcy preference litigation before more Circuits have had the opportunity to address the issue?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-561

THE OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND, *et al.*,
Petitioners,

v.

EDMUND M. MAHERN, TRUSTEE FOR MERCHANTS GRAIN, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

The Court should not grant a writ of *certiorari* in this action. This action may be moot now, and will doubtless be moot unless the Seventh Circuit reverses lower court rulings entered against the Respondent in a related case. Even in the event of a reversal by the Seventh Circuit in the related case, the outcome of this action would almost certainly have no real effect on the substantive rights of the parties.

Second, an obstacle blocks the path this case may offer to review the scope of Congress' power to abrogate a State's Eleventh Amendment immunity. Before reaching that issue, the Court would first have to resolve against

the Respondent the primary issue litigated below—whether the Petitioners are the State of Ohio for Eleventh Amendment purposes.

Third, consideration of this issue should be deferred until more circuits have considered it.

Fourth, in any event, this Court should not grant review of this case until the petition can be evaluated in light of this Court's disposition of *Seminole Tribe of Florida v. State of Florida* (No. 94-12), which was argued on October 11, 1995.

I. THE CASE MAY BE MOOT.

Respondent Edmund Mahern, bankruptcy trustee ("Trustee") for Merchants Grain, Inc. ("MGI") commenced this action in the United States Bankruptcy Court for the Southern District of Indiana ("Bankruptcy Court") on September 11, 1992. The Trustee seeks in this case recovery from the Petitioners (collectively, the "Fund") of approximately $3,000,000 in preferential transfers from debtor-to-be MGI to Ohio grain producers (the "Ohio Farmers") during the 90 days before MGI filed its bankruptcy petition. The Trustee brought this action against the Fund rather than the Ohio Farmers themselves under 11 U.S.C.A. § 550 which provides that a preferential transfer can be recovered either from the transferee or from a party that benefited from the transfer. Because the Fund indemnifies the Ohio Farmers against the great majority of their losses that would have resulted had they not received the preferential transfers, the Trustee chose to sue the Fund rather than approximately 170 individual farmers.

On February 4, 1993, the Bankruptcy Court dismissed this case, holding that the Fund was the State of Ohio for Eleventh Amendment purposes and therefore immune from lawsuits in federal court. While appealing the Bankruptcy Court's ruling, the Trustee on March 25, 1993 instituted a second action (the "Ohio Farmers Case")

naming as defendants the 170 Ohio Farmers who actually received the underlying transfers at issue in this case.[1] The only difference between this action and the Ohio Farmers Case is that this action is brought against the Fund as a party that benefited from the transfers, while the Ohio Farmers Case was brought directly against the Ohio Farmers.

On December 19, 1994, the Bankruptcy Court held in the Ohio Farmers Case that the underlying transfers were not preferential and entered summary judgment for the Ohio Farmers and against the Trustee. *See Merchants Grain, Inc. v. Adkins*, 184 Bankr. 52, 54 (S.D. Ind. 1995). The United States District Court for the Southern District of Indiana affirmed that grant of summary judgment, and the case is now being briefed before the United States Court of Appeals for the Seventh Circuit. *Id.*, Appeal No. 95-2625. It is that case to which the Fund refers in its petition at footnote 1 on page 3.

A. This Action Will Be Moot Unless The Seventh Circuit Reverses The Entry Of Summary Judgment In The Ohio Farmers Case.

The Ohio Farmers Case dismissal was based on the holding that the underlying transfers were not preferential. Unless reversed by the Seventh Circuit or this Court, that judgment will eliminate the substantive basis for the Trustee's claims in this action. The Trustee cannot prevail in this action if the underlying transfers are not avoidable, irrespective of any Eleventh Amendment issues.

In other words, if the Seventh Circuit affirms the Ohio Farmers Case judgment, the Fund would have no Article III standing to pursue this action, since it would have no concrete stake in the outcome of the controversy. *See, e.g., Valley Forge College v. Americans United*, 454 U.S.

[1] The Ohio Farmers Case actually began as four separate actions, later consolidated into one.

464, 472 (1982). Thus this case remains an Article III case or controversy only because of the possibility that the Seventh Circuit may reverse the Ohio Farmers Case judgment.

B. The Outcome Of This Matter Will Have Little Or No Impact On The Trustee's Efforts To Collect Assets Of The Estate Even If The Seventh Circuit Rules In The Trustee's Favor In The Ohio Farmers Case.

For a different reason, this case may be effectively moot even if the Seventh Circuit revives the Ohio Farmers Case. Because of the Fund's admitted indemnity obligations to the Ohio Farmers, the Trustee should in all likelihood recover any judgments against those farmers directly or indirectly from the Fund, regardless of how this Court rules in this case.

In memoranda filed by the Fund seeking to intervene in the Ohio Farmers Case, the Fund has already acknowledged that "a recovery from most of the farmers in [the Ohio Farmers Case] ultimately will be paid by the Ohio Agricultural Depositors Fund, . . ." Appendix at 3a-4a.[2] Thus the Trustee's judgment rights against the Ohio Farmers would create in the farmers corresponding indemnification rights against the Fund.

There may be some prospect that the Fund would nonetheless resist paying its statutory share of any judgments rendered against the Ohio Farmers, asserting a purported lack of standing by the Trustee to assert the farmers' indemnification claims. However, given the Fund's statutory duty to indemnify the Ohio Farmers and its admission that it would ultimately pay its statutory share of any preference judgments against the farmers, the Trustee should easily overcome such resistance by garnishing the farmers' rights against the Fund.

---

[2] The Trustee appends hereto as an Appendix relevant parts of the Fund's Motion For Leave To Intervene in the Ohio Farmers Case.

Whether the underlying transfers are avoidable will be determined by the Seventh Circuit in the Ohio Farmers Case. The Trustee has maintained the pursuit of this action only to preserve the right to collect directly from the Fund, as opposed to garnishing the judgment-debtor farmers' rights against the Fund. It is far from clear, however, that the possibility of that combination of events occurring—(1) reversal of the Ohio Farmers Case by the Seventh Circuit, (2) a subsequent judgment in favor of the Trustee in the Ohio Farmers Case, and (3) resistance by the Fund of its admitted obligation to pay its share of those judgments against the Ohio Farmers—sustains an Article III case or controversy, let alone a case meriting the time and attention of this Court.[3] In short, the outcome of this action will likely have no real impact on the substantive rights of the parties in this case.

For the reasons set forth above, even if this action is presently a case or controversy under Article III of the Constitution, it may not remain one for long. Moreover, it at most only technically remains a case or controversy, leaving the actual stakes low enough to counsel against a grant of *certiorari*.

II. A THRESHOLD ISSUE PREVENTS CONSIDERATION OF THE PURPORTED QUESTIONS PRESENTED.

Even if this Court were to grant *certiorari* in this case, it would not be able to proceed directly to the constitutional question of whether Congress may expose states to liability for the avoidance of preferences under the Bankruptcy Clause. Instead, the Court would first have to address the threshold question that occupied the courts below: Is the Fund really the State of Ohio for Eleventh

---

[3] In fact, the Trustee would agree to dismiss this action if the Fund would stipulate that it would pay its statutory share of any preference judgments rendered for the Trustee in the Ohio Farmers Case.

Amendment purposes? Analysis of the relevant factors leads to the conclusion that the Fund is not the State.

Among the most important of the factors to be weighed in determining when a quasi-governmental entity is entitled to Eleventh Amendment immunity is whether the judgment would be satisfied by the State Treasury. *Benning v. Board of Regents*, 928 F.2d 775 (7th Cir. 1991), *reh. den.*; *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), *reh. den.*, *cert. den.*, —— U.S. ——, 128 L.Ed.2d 867, 114 S.Ct. 2138 (1994); *cf. Paschal v. Jackson*, 936 F.2d 940 (7th Cir. 1991), *cert. den.* 502 U.S. 1081 (1992). That factor cuts against immunity here. The Fund is an independent commission financed not from the Ohio Treasury, but instead from fees assessed against grain handlers. Hence, the Ohio public fisc is not at risk. Indeed, the statute that creates the Fund expressly immunizes the State from liability for claims against the Fund, thus differentiating the State from the Fund.

The Court would have to address these issues before reaching the question of Congress' right to expose a state to suit. Properly analyzed, the threshold issue would moot the purported question presented.

III. THIS COURT SHOULD NOT CONSIDER THE ISSUE OF THE VALIDITY OF 11 U.S.C.A. § 106 UNTIL MORE CIRCUITS HAVE ADDRESSED THE ISSUE.

As of November 1, 1995, this case was the only reported appellate decision on the question of the constitutionality of Congress's exposure of states to preference liability in 11 U.S.C.A. § 106. Since the amendments accomplishing that waiver of sovereign immunity became effective only on October 22, 1994, other Circuits will doubtless have the opportunity to review the amendments in the near future. An Act of Congress is entitled to a presumption of constitutionality, and this case presents no urgent need for review. The better course under these

circumstances is for the Court to benefit from further development of the issues as additional courts of appeals evaluate them and reach conclusions that may or may not be in conflict with the decision below.

IV. *SEMINOLE TRIBE* MAY OR MAY NOT AID IN DECIDING THIS CASE.

A decision on the merits in *Seminole Tribe* may or may not affect the judgment in this case. Regardless of *Seminole Tribe's* disposition, the basis for the decision may affect the Court's decision on the *certiorari* question in this case.

If this Court were considering a grant of *certiorari* in this case (despite the mootness problems discussed above), it should hold the case pending the disposition of the *Seminole Tribe* case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied. In the alternative, the Petition should be held pending disposition of *Seminole Tribe of Florida v. State of Florida* (No. 94-12).

Respectfully submitted,

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November 3, 1995

APPENDIX

APPENDIX

APPENDIX

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Case No. 91-5047-RMV-11

IN RE: MERCHANTS GRAIN, INC.,
Debtor.

Adv. Pro. No. 93-0114

MERCHANTS GRAIN, INC.,
Plaintiffs,

v.

MARK & CHRIS ADKINS, *et al.*,
Defendants.

MOTION FOR LEAVE TO INTERVENE IN ADVERSARY PROCEEDINGS, TO STAY ADVERSARY PROCEEDINGS, AND TO CONSOLIDATE ADVERSARY PROCEEDINGS

The Ohio Agricultural Commodity Depositors Fund and the Ohio Commodity Advisory Commission (hereinafter referred to as "Movants") hereby move this Court, pursuant to Rules 7024 of the Federal Rules of Bankruptcy Procedure and Rule 24 of the Federal Rules of Civil Procedure, for an Order authorizing them to intervene in the above-captioned adversary proceeding, for the reasons set forth in the Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Movants are Defendants in Adversary Proceeding Number 92-123, styled Edmund M. Mahern, Trustee, v. The Ohio Agricultural Commodity Depositors Fund and the Ohio Commodity Advisory Commission. The Trustee sued Movants in that Adversary Proceeding in order to collect from the Ohio Agricultural Commodity Depositors Fund amounts for which the fund would have allegedly been liable as a result of alleged payments made by Merchants Grain, Inc. within the ninety (90) day period preceding its bankruptcy petition. Trustee sought recovery from Movants under Section 547 of the Bankruptcy Code. Movants moved to dismiss that adversary proceeding on the basis that it was barred under the doctrine of sovereign immunity. Pursuant to an Order dated February 4, 1993, this Court entered an Order granting Movants' Motion to Dismiss on the basis that the Adversary Proceeding was barred by sovereign immunity.

The Trustee appealed the Court's decision granting the Motion to Dismiss, and the matter is now pending before the United States District Court for the Southern District of Indiana in Case Number IP93-187-C. While this appeal is pending, Trustee has filed the above-captioned Adversary Proceeding, and three (3) other similar Adversary Proceedings, (93-0114, 93-0115, 93-0116, and 93-0117) against the individual farmers allegedly paid by Merchants Grain, Inc. within the preference period. These Adversary Proceedings are seeking recovery from the farmers arising out of payments allegedly made by Merchants Grain to the farmers for grain that had been deposited with MGI. In the event the Trustee is successful in obtaining a recovery from these farmers, many of these farmers would be entitled to file a claim against the Ohio Agricultural Commodity Depositors Fund for all or part of the amount recovered by the Debtor. Since a recovery from most of the farmers in these Adversary Proceedings ultimately will be paid by the Ohio Agricultural Com-

modity Depositors Fund, Movants seek leave to intervene in these Adversary Proceedings at this time for the purpose of asserting the defense of sovereign immunity which defense has already been upheld by this Court in the prior proceeding. Movants do not intend to waive the defense of sovereign immunity in this or in any other Adversary Proceeding, nor do Movants consent to the jurisdiction of this Court at this time for any purpose other than raising the sovereign immunity defense.

Rule 24 of the Federal Rules of Civil Procedure, made applicable to Adversary Proceedings by Rule 7024 of the Federal Rules of Bankruptcy Procedure, provides both for permissive intervention and for intervention of right. Rule 24 provides, in part, as follows:

> Intervention
>
> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:
>
> (1) when a statute of the United States confers an
>
> * * * * *

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No. 95-561

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1995

THE OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND, ET AL.,

Petitioners,

v.

EDMUND M. MAHERN, TRUSTEE FOR MERCHANTS GRAIN, INCORPORATED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR AMICUS CURIAE STATES OF CALIFORNIA, ET AL. IN SUPPORT OF PETITIONERS OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND, ET AL.

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QUESTIONS PRESENTED FOR REVIEW

Whether Congress Has the Authority Under Article I of the United States Constitution to Abrogate the States' Eleventh Amendment Immunity?

Whether Congress Has the Authority Under the Bankruptcy Clause, Article I, §8, cl. 4, to Abrogate the States' Eleventh Amendment Immunity?

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I. INTEREST OF THE AMICI CURIAE

This case represents an archetypical violation of the Eleventh Amendment; the holding below transgresses the plain language of the Amendment as well as the "broad constitutional principle of sovereign immunity" embodied therein. *Welch v. State Department of Highways and Public Transportation*, 483 U.S. 468, 486 (1987), *quoting Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (Harlan, J. concurring). The resolution of the question presented in this case is of vital importance to all of the amici States.

The Eleventh Amendment to the Constitution states:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

Despite the plain language of the Eleventh Amendment, the Seventh Circuit in this case held that under the Bankruptcy Reform Act of 1994, 11 U.S.C. §106(a), a federal court in Indiana had jurisdiction over a suit brought against Ohio by a citizen of Indiana, and that the federal courts could order monetary relief from the Ohio treasury.[1]

The jurisdiction of federal bankruptcy courts over suits against States is an important issue to the amici

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[1] This case involves a suit against the state by a citizen of another state; it matches exactly the literal words of the Amendment, and the judicial gloss of *Hans v. Louisiana*, 134 U.S. 1 (1890) is unnecessary to its decision. Thus, arguments to revisit *Hans* such as that made by petitioners in *Seminole Tribe of Florida v. Florida*, No. 94-12, are inapplicable.

States for several reasons. Bankruptcy is a nationwide and relatively common occurrence. Close to 1 million bankruptcies are filed each year. GAO Rep., Subcomm. on Economic and Commercial Law, Comm. on the Judiciary, H.R., Bankruptcy Administration; Case Receipts Paid to Creditors and Professionals, July 1994, Table 1, p.28 [hereinafter cited as "GAO Rep."]. In contrast, the total number of all other civil and criminal cases filed in federal court is about 276,000 per year. Committee on Long Range Planning, Judicial Conference of the United States, Proposed Long Range Plan for the Federal Courts, March 1995, p.18, Table 7. In order to facilitate the resolution of the party's debts, the bankruptcy courts are given wide jurisdiction over both the debtor and its assets wherever they are found throughout the country.

Any State may find itself in Ohio's position given appropriate circumstances. Indeed, several bankruptcy courts have, since 1994, forced States to answer to a federal court under §106(a). *See, Stern v. Massachusetts Alcohol Bev. Control Comm.* (*In re J.F.D. Enterprises*), 183 B.R. 342 (Bankr. Mass., 1995) (Bankruptcy court ordered State to approve the sale of a license to sell alcoholic beverages "free and clear" of any lien or encumbrance; State's immunity "properly abrogated" by §106(a)); *Sparkman v. Florida Dept. of Revenue* (*In re York-Hanover Developments, Inc.*), 181 B.R. 271 (Bankr. E.D. N.C. 1995) (Florida sued for money damages in North Carolina bankruptcy court; Congress had authority to abrogate the States' Eleventh Amendment immunity under §106(a)).

Suits against States in bankruptcy courts are particularly disruptive to State policy, planning and financial stability because, in addition to being completely

unpredictable, such suits can involve large amounts of money. Gross receipts[2] in bankruptcy total about $1 billion a year. GAO Rep., *supra* at pp.1-2, 34. The actual debts that are subject to control by the bankruptcy courts are far higher. Section 106(a) allows several types of claims to be asserted by private parties against States in bankruptcy proceedings, including preference actions under §547 and tax suits under §505 of the Bankruptcy Code. These suits are particularly onerous because State governments, unlike the federal government and other large creditors, do not and cannot have offices and counsel in every jurisdiction. For these reasons, State dignity and sovereignty are at special risk in the bankruptcy setting.

The Seventh Circuit's ruling strikes at the very heart of State sovereignty in that it offends both of the Eleventh Amendment's "twin reasons for being": protection from federal invasion of a State's dignity and fiscal solvency. *Hess v. Port Authority of N.Y. and N.J.*, 115 S.Ct. 394, 400, 404 (1994). The ruling below offends the dignity of the State, because it allows the federal courts to take away the fundamental ability of the State's voters to "exercise their political will to direct state policy." *Hess*, 115 S.Ct. at 402. In 1968, Ohio created the Ohio Agricultural Commodity Depositors Fund ("Fund") in order to indemnify grain depositors who lose money due to the insolvency of commodity handlers. Page's Ohio Revised Code ("O.R.C.") §926.18. In addition, the Ohio legislature provided for licensure of commodity handlers by the State. O.R.C. §926.02.

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[2] "Gross receipts" are the total receipts paid to professionals and to creditors, not the amount of money actually owed.

This case arose when the Director of the Ohio Department of Agriculture, pursuant to the statutory scheme, suspended the license of a commodity holder, Merchants Grain Inc., ("MGI"), recovered funds from MGI, and paid depositors whose grain had been handled by MGI. By requiring Ohio to reimburse these monies to MGI, the Seventh Circuit ruling below allows the federal courts to override the state statutory process, thus disregarding the policy choices of the State voters, and offending the dignity of the sovereign State.

In addition, because the Fund is part of the Ohio State treasury (O.R.C. §926.16(A)), and is expressly backed by the general revenue fund of the State (O.R.C. §926.19(C)), recovery under the Seventh Circuit ruling would be from the Ohio state treasury. Indeed, the Seventh Circuit held that "[t]here can be no doubt in the present case . . . that the State of Ohio is the real party in interest," precisely because the Fund is part of the State treasury. The ruling below therefore also offends the second of the Eleventh Amendment's "reasons for being," protection of the financial solvency of the State treasury. *Hess*, 115 S.Ct. at 404.[3]

Amici States believe that the Seventh Circuit erred as a matter of law in holding that Congress has the power to

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[3] In *Seminole*, the Tribe and the United States as amicus argued extensively for the application of the doctrine announced in *Ex Parte Young*, 209 U.S. 123 (1908). Whatever role the *Ex Parte Young* doctrine may have in *Seminole*, it is irrelevant to this case, which, as the Seventh Circuit noted, involves only retroactive monetary relief from the State treasury, and not prospective injunctive relief against a State official.

abrogate a State's Eleventh Amendment immunity under Article I, §8, cl. 4, or indeed under any portion of Article I.[4]

Congress cannot use its Article I powers to expand Article III jurisdiction to allow States to be subject to suit in federal court, least of all under the Bankruptcy Clause. A decision that Congress has that broad authority under Article I has potentially vast and far-reaching consequences for all States, and amici States are therefore vitally interested in the resolution of this case.

II. REASONS FOR GRANTING THE WRIT

In *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989), this Court held that Congress had not effectively abrogated State Eleventh Amendment immunity from suit under the Bankruptcy Act, former 11 U.S.C. §106(c). In October 1994, Congress passed the Bankruptcy Reform Act, which expressly purports retroactively to abrogate the States' Eleventh Amendment immunity, 11 U.S.C. §106(a). The Seventh Circuit's decision upholding §106(a) against Ohio's Eleventh Amendment challenge squarely presents the issue of Congress' power to abrogate State Eleventh Amendment immunity under the Bankruptcy Clause.

The Seventh Circuit relied on this Court's ruling in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which

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[4] To add insult to injury, under the Bankruptcy Reform Act, Congress purported *retroactively* to abrogate the States' Eleventh Amendment immunity, further damaging Ohio's ability to plan for its future and protect its treasury.

four Justices, led by Justice Brennan, stated that Congress had power to abrogate Eleventh Amendment immunity under the Interstate Commerce Clause, four Justices, led by Justice Scalia, stated that Congress did not, and Justice White concurred in Justice Brennan's result but expressly disagreed with his rationale. This case demonstrates the necessity for this Court to revisit *Union Gas*, and overrule or clarify the scope of that ruling.

Amici States urge this Court to hold in this case that Congress does not have the authority to abrogate the States' Eleventh Amendment immunity under any part of Article I, and to revisit and overrule *Union Gas* as part of that holding. At the least, amici States believe that decision must be confined to the Interstate Commerce Clause and should not be extended to grant Congress power to abrogate under any other portion of Article I, including the Bankruptcy Clause.

A. Certiorari Should be Granted to Establish that Congress Does Not Have Authority Under Article I to Abrogate a State's Eleventh Amendment Immunity to Suit in Federal Court.

1. *Union Gas* Must Be Overruled, or at a Minimum, Clarified and Limited.

Amici States agree with Ohio that certiorari should be granted to establish that this Court's decision in *Union Gas* does not stand for the sweeping abrogation principle the Seventh Circuit derived from that decision.

No single theory of Congress' power to abrogate State Eleventh Amendment immunity commanded a majority of the Court in *Union Gas*. The plurality opinion

of Justice Brennan held that the States agreed "in the plan of the convention" to allow the federal government to abrogate Eleventh Amendment immunity when legislating under the Commerce Clause. *Union Gas*, 491 U.S. at 19, *citing Monaco v. Mississippi*, 292 U.S. 313, 322-323 (1934) *quoting The Federalist* No. 81, p.657 (A. Hamilton) (H. Dawson ed. 1876). Justice Brennan argued that the States implicitly agreed that Congress' power under the Commerce Clause "would be incomplete" without a damages remedy against the States. *Union Gas*, 491 U.S. at 19.

However, the fifth and deciding vote in *Union Gas* was that of Justice White, who expressly stated he did not agree with Justice Brennan's broad implied waiver theory of abrogation. His discussion explaining his vote indicates only that he believes Congress has the ability to subject States to suit. Justice White's distinction of his views from the plurality casts in doubt the proper definition of the "narrowest ground" for which Union Gas stands. It is unclear, for example, whether Justice White's rationale narrows the scope of the plurality's holding, as suggested by one circuit court,[5] or whether it leads to a

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[5] In *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995), the Fifth Circuit concluded that Justice White's rationale in *Union Gas* was the theory advanced in *Parden v. Terminal Ry. of Ala. State Docks Dept.*, 377 U.S. 184 (1964): that the Federal Government can demand a waiver of State sovereign immunity as a condition to State action under the Commerce Clause. Justice White was in the majority in *Welch*, which overruled *Parden* "to the extent that [it] is inconsistent with the requirement that an abrogation on Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." *Welch* at 477. But the *Welch* court declined to consider the validity of the *Parden* holding "that Congress has power to

congruent result on a different theory. Additionally, because it is not clear what "settled rule of law" *Union Gas* established with regard to abrogation under Article I, the case does not command the usual deference as a matter of *stare decisis*.

In any event, as strikingly illustrated by this case, the Courts of Appeal are in the dark as to how to interpret *Union Gas*, and are irreconcilably split as to its scope. The Eleventh Circuit in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994), distinguished *Union Gas*, and held that Congress did not have the power to abrogate under the Indian Commerce Clause. The Seventh Circuit in this case, *citing Union Gas*, held that Congress could abrogate under the Bankruptcy Clause. The Fifth Circuit in *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995), interpreted Justice White's opinion to narrow *Union Gas*, but held that Congress could abrogate under the Copyright and Trademark clauses of Article I. This Court's guidance is clearly needed.

2. Congress Has No Power to Abrogate a State's Eleventh Amendment Immunity Under Any Provision of Article I.

Until *Union Gas*, in every case of waiver of a State's constitutional immunity to suit, this Court has required "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be

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abrogate the States' Eleventh Amendment immunity under the Commerce Clause to the extent that the States are engaged in interstate commerce." *Id.* at 477 n.8.

barred by the Eleventh Amendment." *Atascadero State Hospital v. Scanlon*, 473 U.S 234 at 238, n.1 (1985). A State is deemed to have waived its immunity "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Atascadero*, 473 U.S. at 239-40, *quoting Edelman v. Jordan*, 415 U.S. 651 at 673 (1974), *quoting Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).

There is good reason for such a strong requirement for waiver. "[T]he Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States." *Atascadero* at 238. The States understood the "plan of the convention" to embody a respect for State sovereignty including immunity from suit. It is therefore necessary to require waiver in express and overwhelming terms in order to ensure that this fundamental right is not mistakenly violated.

There is no express waiver in Article I. The plain language of Article I, even those portions in which the States are explicitly mentioned, does not contemplate surrender of sovereign immunity to the Union. There are no express commands to the States in Article I, nor any express declaration of Congress' power to enforce them against the States through the device of private lawsuits. Article I merely enumerates the powers of Congress. Article III defines the jurisdiction of the federal courts to hear and enforce requirements enacted pursuant to the powers enumerated in Article I.

The Court has defined three classes of cases, not implicated here, in which federal jurisdiction is established over the states " 'by consent and delegated authority' as a necessary feature of the formation of a more perfect Union," *Monaco*, 292 U.S. at 328-29: suits between sovereign States, between a State and the United States, and those under the Fourteenth Amendment. *Monaco*, 292 U.S. at 328-330; *Fitzpatrick v. Bitzer*, 427 U.S. 445 at 452-456 (1976). These three categories of waiver are firmly rooted in the structure of the federal system, and necessary to "a more perfect Union."

It is considered necessary for the United States to be able to sue a State in federal court; without it the "permanence of the Union might be endangered." *Monaco*, 292 U.S. at 329, *quoting United States v. Texas*, 143 U.S. 621 (1892). The States must be able to sue each other for the same reason. *Monaco*, 292 U.S. at 328-29.

The Fourteenth Amendment is unique in that it is aimed at the behavior of the States toward their citizens and has an explicit provision giving Congress the power of enforcement. The language of the Amendment indicates that a private right of action in federal court was contemplated, as being the most realistic way to vindicate the rights of citizens against the State which denied them their rights. The legislative history and historical context of the Fourteenth Amendment, adopted in the wake of the Civil War, confirm that it places unique limits on the States' sovereignty in order to continue to hold the Union together.

The language of Article I does not resemble that of the Fourteenth Amendment; it does not speak of the

State's duty to its private citizens, nor of a Congressional power to enforce any behavior by a State toward its citizens. Neither the history of this nation nor the structure of the Constitution support any argument that it is necessary to the survival of the Union to permit suits of States by private citizens in federal court under the various Article I powers.

The theory of abrogation advanced by the Seventh Circuit has no grounding in the text of the Constitution, nor is it necessary to the continued existence of the Union. Accordingly, it has virtually no limits. It would allow Congress to subject States to suits by private individuals in any situation in which one of the broad powers granted in Article I would allow the federal government to legislate directly.

This Court's consistent jurisprudence requiring express and overwhelming indicia of waiver of Eleventh Amendment immunity from a State in its statutes is fundamentally inconsistent with allowing waiver of the same sovereign immunity by mere implication in Article I. Nor is such waiver necessary to the permanence of the Union. To the contrary, "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero* at 239, n.2.

Indeed, the distinct histories of several specific Article I clauses including the Interstate Commerce Clause and the Bankruptcy Clause, (discussed below), and the Indian Commerce Clause (discussed in *Seminole*, Amicus Curiae brief of California et al. at 15-18) indicate that the

States had no thought of a broad waiver of sovereign immunity encompassing all Article I powers "in the plan of the convention," as the Seventh Circuit would have it.

If waiver of Eleventh Amendment sovereign immunity can be implied from any part of Article I, the power of Congress over the States is virtually limitless. "[I]t contradicts [the Court's] unvarying approach to Article III as setting forth the exclusive catalog of permissible federal-court jurisdiction." *Union Gas*, 491 U.S. at 39 (Scalia, J., concurring in part and dissenting in part).

Amici States therefore respectfully request that the Court grant certiorari in this case in order to overrule or at least clarify *Union Gas*, and restore the proper limits to Article III power, and the proper balance of power between State and federal governments.

B. Certiorari Should be Granted to Establish that Congress Does Not Have Authority Under The Bankruptcy Clause to Abrogate a State's Eleventh Amendment Immunity.

The Seventh Circuit extended the "plan of the convention" waiver theory of the *Union Gas* plurality to this case; yet neither the plain language of the Bankruptcy Clause nor its history countenance any such argument. The Bankruptcy Clause merely gives the Congress power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." The States, as such, are not even mentioned, much less their interaction with each other or with the federal government. A system of uniform laws can and has been established for bankruptcies without the necessity for abrogating the States'

sovereign immunity, and the plain language chosen by the framers does not show that they intended to cede State sovereign power to the United States with regard to bankruptcy laws and courts.

This argument is bolstered by the historical analysis of the Bankruptcy Clause. There is no evidence that the framers actually considered the scope of Congress' power against the State under the Bankruptcy Clause. The Bankruptcy Clause was the subject of very little debate at the time of ratification of the Constitution. Indeed, the subject of bankruptcy was not considered "until a very late date" by the participants. The final recommendation for a bankruptcy clause was adopted with "practically no debate." Charles Warren, Bankruptcy in United States History, (1935) pp.4-5.

There is no tradition of broad federal legislation under the Bankruptcy Clause being generally accepted by the States. To the contrary, national bankruptcy laws had a spotty and troubled history until fairly recent times. No attempt to affect State sovereignty was made until the Reform Act of 1978.

In general, the various bankruptcy acts were passed in reaction to a specific economic crisis, and quickly repealed when the crisis was perceived to be at an end. *See* Lawrence M. Friedman, A History of American Law, 269-270. The first two bankruptcy acts were repealed in haste, and generally disliked. The first law, passed in 1800, was criticized and called "immoral" and "anti-Republican." Friedman, *supra* at 269; Warren, *supra*, pp.21-22. It lasted only two and a half years. Act of Apr. 4, 1800, 2 Stats. 19, repealed Dec. 19, 1803, 2 Stats. 248.

The second law, passed in 1841, also was abolished quickly. Act of Aug. 19, 1841, 5 Stats. 440, repealed Mar. 3, 1843, 5 Stats 614. Yet another law was passed in 1867 "though by the merest hair, and over bitter opposition" in Congress. Friedman, *supra* at 549. This Act also proved a failure, was amended in 1874 in an attempt to ease the criticism, and finally repealed in 1878. Finally, in 1898 a bankruptcy act was passed that survived until 1978, when it was replaced with the current Bankruptcy Reform Act. 30 Stats. 544.

During the periods when there was no bankruptcy law, State insolvency laws took over. There was some controversy as to whether these laws were preempted by the Bankruptcy Clause of the Constitution. Friedman at 274. In 1819, this Court found that they were not, although the State laws could not impair the obligation of contract. *Sturges v. Crowninshield*, 17 U.S.C. (4 Wheat.) 122 (1819). Unlike under the Commerce Clause, there is no "dormant" bankruptcy power over the States; the States can pass, and frequently have passed and enforced State insolvency statutes in the absence of a federal bankruptcy law.

In addition, the Bankruptcy Code itself leaves major issues to States' laws. For example, there are no federal insolvency statutes for insurance companies and 11 U.S.C. §109(b)(2) prohibits them from filing a bankruptcy petition. The result is that Congress has actually required insurance companies to liquidate only under State law. In addition, "property of the estate" is determined by State law. 11 U.S.C. §541; *see Butner v. United States*, 440 U.S. 48, 54 (1979). The Code also allows the States to adopt their own exemption laws. 11 U.S.C. §522(b)(2). The property

of the estate must be managed according to State law. 28 U.S.C. §959(b).

The Commerce Clause, the Article I power at issue in *Union Gas,* has a very different history from that of the Bankruptcy Clause. It reflects a different understanding of the relative powers of the States and the federal government. The Commerce Clause itself was the subject of considerable debate at the time of the Constitutional Convention, and the time of ratification. Indeed, the provision " 'reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.' " *Wardair Canada, Inc. v. Florida Dept. of Revenue,* 477 U.S. 1, 7 (1986), *quoting Hughes v. Oklahoma,* 441 U.S. 322, 325-326 (1979); *see also The Federalist* No. 42 (J. Madison), p.7 (J. Cooke ed. 1961). *Oklahoma Tax Commission v. Jefferson Lines, Inc.,* 115 S.Ct. 1331 at 1335-36 (1995).

The breadth and application of the Bankruptcy Clause to the States is also sharply distinguishable from the Commerce Clause powers over the States. As stated in the plurality opinion in *Union Gas*: "[i]t would be difficult to overstate the breadth and depth of the commerce power. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937); *Wickard v. Filburn,* 317 U.S. 111, 127-128 (1942); *Katzenbach v. McClung,* 379 U.S. 294 (1964)." *Union Gas,* 491 U.S. at 20. Not only is the power great, but it is unique among all of the constitutional powers, in that it "displaces state authority, even where

Congress has chosen not to act, *see Gibbons v. Ogden*, 9 Wheat. 1 (1824); *Missouri Pacific R. Co. v. Stroud*, 267 U.S. 404, 408 (1925); *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493 (1989), and it sometimes precludes state regulation even though existing federal law does not pre-empt it, *see Philadelphia v. New Jersey*, 437 U.S. 617, 621, n.4, 628-629 (1978); *Northwest Central Pipeline Corp., supra.*" *Union Gas*, 491 U.S. at 20.

The historical development of the Bankruptcy Clause, and of federal bankruptcy law also indicates a very different relationship between the States and the federal government with regard to bankruptcy than the relationship with regard to Indian affairs. The Indian Commerce Clause, the Article I power at issue in *Seminole*, was understood from the beginning to shift control over Indian affairs from the States to the United States.

The inability to control trade with the Indians under the Confederation was the impetus for Madison to urge adoption of the Indian Commerce Clause.[6] The subject of trade with the Indians was discussed by Madison in *The Federalist Papers*. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 n.4 (1985), *citing The Federalist* No. 42, p.284 (J. Cooke, ed. 1961). Even before the Constitution,

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[6] However, even before the adoption of the Constitution, some principles had been established regarding the nature of Indian interests in property. No one could purchase Indian land without the consent of the sovereign. *Oneida* at 234. Before the Revolution, the "sovereign" was the Crown. After the Revolution, but before the ratification of the Constitution, there was doubt as to whether the "sovereign" was the individual State or the United States. After the ratification of the Constitution, the "sovereign" became the United States. *Oneida* at 234.

the central government had asserted control over Indian affairs in the Articles of Confederation. Articles of Confederation, art. IX. Despite this, some States argued that there was no federal authority over their power to trade with the Indians. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

Congress took steps to regulate Indian affairs almost immediately after the Constitution was ratified; the first Indian Trade and Intercourse Act was passed in 1790, at the urging of President Washington and the Secretary of War. Ch. 33, 1 Stat. 137. In 1793 a stronger version of the Act was passed. 1 Stat. 330, §8. Under both Acts, no person was allowed to purchase Indian lands unless pursuant to a treaty with the United States. *See, Oneida*, 470 U.S. 226 at 231-232. Numerous cases and statutes since that time have recognized the federal nature of Indian commerce. In contrast to the early and continuous history of federal involvement and control over commerce with the Indians, the federal role in bankruptcy is of relatively recent vintage.

Amici States reassert, without repeating herein, their position that despite the well-settled extent of federal authority over Indians generally, the Indian Commerce Clause does not give power to Congress to abrogate a State's Eleventh Amendment immunity. *See Seminole*, Amicus Curiae brief of California et al. at 15-18. Similarly, as set out above, amici States assert that the Commerce Clause does not give power to Congress to abrogate a State's Eleventh Amendment immunity. *A fortiori*, the plain language, history and jurisprudence of the Bankruptcy Clause presents yet a stronger argument that

States did not cede this authority to Congress in "the plan of the convention."

In *Hoffman*, this Court held that Congress had not sufficiently indicated its intention to abrogate the State's Eleventh Amendment immunity in the Bankruptcy Act. The *Hoffman* Court expressly reserved on the issue of whether Congress has the *power* to abrogate under the Bankruptcy Clause. 492 U.S. at 104. This Court has never determined whether Congress has power to abrogate the States' Eleventh Amendment immunity under the Bankruptcy Clause. While, as noted above, some lower courts have held that §106(a) abrogates Eleventh Amendment immunity and assume that Congress has the power to do so, these holdings are based on what amici States believe is an unwarranted extension of Justice Brennan's opinion in *Union Gas*. Certiorari is warranted to establish that the Bankruptcy Clause does not grant Congress power to abrogate the Eleventh Amendment.

III. CONCLUSION

For all the foregoing reasons, amici States respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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No. 95-561

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1995

THE OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND, et al.,

Petitioners,

v.

EDMUND M. MAHERN, TRUSTEE FOR MERCHANTS GRAIN, INCORPORATED,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

1. Petitioners sought certiorari for several reasons. First, this case squarely raises important questions about a key structural component of federalism -- whether Congress has authority under Article I of the United States Constitution to waive a State's immunity from money damages actions and, if so, whether that authority extends equally to all Article I powers. Second, these questions have sharply divided the United States Courts of Appeals and warrant prompt resolution. Since the Court's plurality decision in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), lower courts have broadly disagreed -- and continue to disagree -- about the breadth and rationale of that decision. Compare *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994), *cert. granted*, No. 94-12, *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995), and *The Ohio Agricultural Commodity Depositors Fund v. Mahern*, 59 F.3d 630 (7th Cir. 1995). Third, this case raises a question of special concern to all 50 States. As shown by the amicus brief filed by the State of California in support of the petition, the States are as one in requesting the Court to overrule, or at least limit, *Union Gas* in order to preserve their time-honored prerogative of immunity from money-damages suits.

Respondent, in opposing the petition, conspicuously fails to challenge these critical premises. At no point in his brief does he dispute the importance of this federal question. Nor does he disagree that at least three Courts of Appeals have reached different conclusions about the impact of *Union Gas*. And, above all, he does not defend *Union Gas* -- even though the States, including most notably his own, have all called for its overruling.

2. What Respondent does argue in no way undermines these traditional bases for granting certiorari. Respondent initially suggests that even though the parties admittedly have a very real case and controversy today, they may not have one at some as-yet-undefined point in the future. Opp. Br. at 3. Pointing to collateral litigation involving the question whether certain Ohio farmers received preferential transfers from the debtor, *see Merchants Grain, Inc. v. Adkins*, 184 Bankr. 52 (S.D. Ind. 1995), Respondent claims that if he ultimately loses that ongoing litigation, the State will not be liable for $3 million.

This argument overlooks several critical points. It first overlooks Respondent's aggressive efforts to prevent this contingency from happening: He has appealed the district court's preferential-transfer ruling in the collateral action to the Seventh Circuit, No. 95-2625, and continues to seek recovery from the State in this action. Nor is the collateral action likely to be resolved any time soon. The appeal to the Seventh Circuit is in its nascent stages; briefing has only just begun.

But, most importantly, this argument incorrectly focuses on one component of Eleventh Amendment immunity while slighting another. Immunity from suit is not just about money. It is also about the affront of being haled into court by a private party against a State's will -- in this case, about being made an involuntary defendant in a bankruptcy proceeding commenced by an Indiana citizen in a federal court in Indiana. In rejecting a similar argument to the one Respondent is making here, this Court observed that

> respondent's claim that the Eleventh Amendment confers only protection from liability misunderstands the role of the Amendment in our system of federalism: "[t]he very object and purpose of the 11th amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties."

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, ____ U.S. ____, 113 S.Ct. 684, 689 (1993) (quoting *In Re Ayers*, 123 U.S. 443, 505 (1887)).

Just as this Court in *Puerto Rico Aqueduct* permitted interlocutory appeals of denied sovereign immunity motions because they "purport to be conclusive determinations that [States] have no right not to be sued in federal court," 113 S.Ct. at 688, it is no less appropriate in this instance to review a case that may or may not be affected by a future collateral action. Both types of actions are the same for Eleventh Amendment purposes. In each

instance, the State may ultimately succeed in protecting one Eleventh Amendment value -- its Treasury; but, at the same time, it will be forced to sacrifice a second Eleventh Amendment value -- being free from the indignity and expense of defending the action at all. Confirming the point is this Court's review of the Third Circuit's decision in *Pennsylvania v. Union Gas* itself. The Court did not wait until Pennsylvania had been hit with a money-damages award; it instead immediately reviewed the State's motion to dismiss on Eleventh Amendment grounds. The Court should review this case as well.

3. Respondent's second argument is a variation of his first. He contends that the case may still become moot no matter what happens in the preferential-transfer action, because at some still-later date it may be determined that the State has a duty to indemnify the potential liability of the Ohio farmers. Opp. Br. at 4-5. As an initial matter, however, the State has never conceded liability to the farmers; it has merely acknowledged that the question of liability exists under State law.

More fundamentally, the argument once again disrespects the State's Eleventh Amendment right to be free from suit now, not just to be free from liability at some later date. Having chosen to file this $3 million action against the State in the first instance, Respondent is ill-positioned to complain that the action eventually may become unnecessary. Respondent initiated this lawsuit. He has never claimed that the case was moot (at least before now). And he has not yet dismissed it. Unless and until Respondent drops this action, he is ill-positioned to complain about the State's current interest in terminating it. As previously shown, the Eleventh Amendment not only protects States from liability for money-damages actions brought by private parties; but it also protects them from having to defend them at all.

4. Respondent next suggests that the case is a poor vehicle for reviewing Congress's authority to waive state sovereign immunity because it is unclear whether the Ohio Agricultural Commodity Depositors Fund is in fact a State entity. Opp. Br. at 5-6. Nothing could be further from the truth. "[T]here can be no

doubt," the Seventh Circuit correctly found, "that the State of Ohio is the real party in interest" in this action. Appendix, at 5. The conclusion has ample support. Under Ohio law, (1) the Fund is a part of the state treasury, O.R.C. 926.16(A); (2) it is administered by the Director of the Ohio Department of Agriculture, a State official acting in his official capacity and paid by the State (and therefore also protected by the Eleventh Amendment), O.R.C. 926.16(D); (3) all claims for indemnification from the Fund are filed with the Director who assesses the claim and provides for payment, O.R.C. 926.18(A) and (C); (4) "all disbursements from the [F]und shall be paid by the treasurer of state pursuant to vouchers authorized by the Director," O.R.C. 926.18(D); and (5) the Director is responsible for requesting an appropriation from the general revenue fund of Ohio in the event that monies in the Fund "are not sufficient to pay the examination and administrative costs of this Chapter," O.R.C. 926.19(C).

The enabling legislation also provides:

> This chapter is enacted for the benefit of the state, and neither the state, its departments, agencies, or commissions, or its employees and officials either elected or appointed, shall be held liable for any injuries to third parties, for the exercise of their authority, or for the use of their discretion on the matters to which this chapter relates.

O.R.C. 926.33(B). As these provisions make clear, the Ohio legislature intended the Fund and its administrators to come within the protections of the State under the doctrine of sovereign immunity. The Fund, under these circumstances, plainly is a State entity for purposes of Eleventh Amendment immunity without regard to the source of the money that supplies the Fund. Respondent's contrary argument is simply mistaken. *See, e.g., Hess v. Port Authority Trans-Hudson Corp.*, __ U.S. __, 115 S.Ct. 394, 402-406 (1994); *Mercer v. Magnant*, 40 F.3d 893, 898-99 (7th Cir. 1994).

5. Respondent next requests the Court to stay its hand on this issue until more lower courts have ruled on the question. Opp. Br. at 6-7. But several lower courts already *have* ruled on the question, and reached different results. True, the Seventh Circuit is the first Court of Appeals to address the validity of 11 U.S.C. 106. But it is hardly the first lower appellate court to address the broader question raised here -- whether Congress has authority under its Article I powers to waive a State's immunity from money-damages actions and, if so, whether that authority extends equally to each Article I power. *See Seminole Tribe of Florida v. State of Florida, et. al.*, 11 F.3d 1016 (11th Cir. 1994), *cert. granted*, No. 94-12 (finding no authority under Indian Commerce Clause); *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995) (finding authority under Copyright Clause). Because the Courts of Appeals already have split on this important federal question, because the breadth and rationale of the Court's plurality decision in *Pennsylvania v. Union Gas* remains unclear, and because the States all support Ohio's request to resolve this issue now, there is no tenable reason for delaying consideration of the issue.

6. Respondent finally requests the Court to hold the petition for its decision in *Seminole Tribe*, No. *94-12*. Opp. Br. at 7. Petitioners do not disagree. However, if the Court is not going to reach the question of congressional authority in *Seminole Tribe*, then Petitioners respectfully request the Court to grant certiorari now.

CONCLUSION

For these reasons and those mentioned in the petition, certiorari should be granted in this case.

Respectfully submitted,

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